CLERK'S COPY.

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 /941/

No. 420 10

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. 422 11

CITY OF INDIANAPOLIS, ET AL., PETITIONERS,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.

No. 423 12

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.

No. 424 13

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., PETITIONER,

vs.

THE INDIANAPOLIS GAS COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 12, 1940.

CERTIORARI GRANTED OCTOBER 28, 1940.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. _____

THE CITY OF INDIANAPOLIS, ET AL.,
Petitioners,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, ETC., ET AL.,
Respondents.

Two Causes—C. C. A. Nos. 7143-7144.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 813 to 1238, inclusive, contain a true copy of Volume III of the printed record, printed under my supervision and filed on the twentieth day of December, 1939, which together with Volumes I and II of the printed record, constitutes the record, upon which the following entitled causes were heard and determined:

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellant,

7143 *vs.*

Citizens Gas Company of Indianapolis, et al.,
Defendants-appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellee,

7144 *vs.*

The Indianapolis Gas Company,
Defendant-appellant.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of August, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the twenty-second day of November, 1939, there was filed in the office of the Clerk of this Court, a certificate to exhibits, which said certificate to exhibits is in the words and figures following, to-wit:

United States of America
Southern District of Indiana } ss.
Indianapolis Division

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the following are original exhibits in the case of The Chase National Bank of the City of New York, Trustee *vs.* Citizens Gas Company of Indiana, et al., No. 1844 Equity, to be transmitted to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in accordance with an order entered on October 28, 1939:

Plaintiff's Exhibit 2 for identification.
Plaintiff's Exhibit 3 for identification.

Plaintiff's Exhibits 89 to 94, inclusive, 95A, 96A, 97A, 98A, 99 to 110, inclusive, and 124.

Plaintiff's Exhibit 133, being the deposition of R. E. Simond and all the exhibits attached thereto.

Plaintiff's Exhibit 134, being the depositions of C. M. Clark and J. E. Baker and all the exhibits attached thereto.

Plaintiff's Exhibit 135 for identification.

City's Exhibits 7A to 7E, inclusive, 7G, 10 and 11.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 20th day of November, 1939.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court, Southern District of Indiana.*

Endorsed: Filed November 22, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1939, there was filed in the office of the Clerk of this Court, a stipulation as to printing of record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, *Plaintiff-Appellant,* *vs.* Citizens Gas Company of Indianapolis, The City of Indianapolis, a Municipal Corporation, The Indianapolis Gas Company, *et al.*, *Defendants-Appellees.*	Nos. 7143, 7144.

STIPULATION AS TO PRINTING OF RECORD.

It is hereby stipulated by all of the parties to this proceeding, in pursuance of the provision of Rule 21 (now Rule 14) of this Court, that only parts of the transcript of record shall be printed and that the parts hereinafter

stipulated to be printed are the only parts of the record material to the determination of the questions presented on this appeal.

It is hereby stipulated that the Clerk shall print the entire transcript of record as received from the Clerk of the District Court, with the exception of the particular matters hereinafter specifically enumerated, to wit:

1. As to "Findings of Fact and Conclusions of Law Submitted by City of Indianapolis":

(a) In place of the last 26 lines on page 5 and the first 6 lines on page 6, insert:

"(Here follows the 5th grammatical paragraph of Subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I R. 46, lines 13-26))."

(b) In place of the last 15 lines on page 8 and the first 4 lines on page 9 insert:

"(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26))."

(c) In place of the last 28 lines on page 9 insert:

"(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85))."

(d) In place of all but the first 2 lines on page 11, and the first 22 lines on page 12 insert:

"(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94))."

(e) In place of the last 30 lines on page 14 insert:

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(f) In place of the last 30 lines on page 17 and the first 9 lines on page 18 insert:

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))."

(g) In place of the last 11 lines on page 18 and the first 15 lines on page 19 insert:

"(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72))."

2. As to the "Special Findings of Fact" of the Court:

(a) In place of the last 20 lines on page 4 and the first 13 lines on page 5 insert:

"(Here follows the fifth grammatical paragraph of

subdivision XIV of the Mortgage (Exhibit A to the bill of complaint, I R. 46, lines 13-36))."

(b) In place of the last 2 lines on page 10 and the first 17 lines on page 11 insert:

"(Here follows paragraph 1(g) of the Franchise Contract of August 25, 1905 (part of Exhibit C to the bill of complaint, I R. 84, lines 13-26))."

(c) In place of the last 15 lines on page 11 and the first 13 lines on page 12 insert:

"(Here follows paragraph 1(i) of the Franchise Contract (part of Exhibit C to the bill, I R. 84-85))."

(d) In place of the last 22 lines on page 13 and all of page 14 insert:

"(Here follow subdivisions 21, 22, 23 and 24 of the Franchise Contract (part of Exhibit C to the bill, I R. 93-94))."

(e) In place of the last 20 lines on page 17 and the first 11 lines on page 18 insert:

"(Here follows all of the first paragraph of subdivision 1 of the Lease except the last sentence thereof (Exhibit B to the bill of complaint, I R. 55-56))."

(f) In place of the last 25 lines on page 20 and the first 15 lines on page 21 insert:

"(Here follows the first grammatical paragraph of subdivision 15 of the Lease (Exhibit B to the bill, I R. 64))."

(g) In place of the last 7 lines on page 21 and the first 19 lines on page 22 insert:

"(Here follows subdivision 22 of the Lease (Exhibit B to the bill, I R. 72))."

3. As to the complete stenographic report of the proceedings at the trial, omit:

(a) Page 112, last 8 lines; all of pages 113 and 114, and all of page 115 except the last line.

(b) Last 4 lines of page 189; pages 190 and 194, inclusive, and all but last 7 lines of page 195.

(c) All but first 2 lines of page 196, pages 197 and 198, and first line of page 199.

(d) Last 11 lines of page 199, pages 200 and 201, and first 10 lines of page 202.

(e) All of page 206, except first 7 lines; all of pages 207 to 211, inclusive; and all of page 212 except the last 8 lines.

(f) All of page 219, except the first 5 lines; all of pages 220 to 231, inclusive; and the first 3 lines of page 232.

(g) The last 9 lines of page 243 and pages 244 to 251, inclusive.

(h) The last 8 lines of page 259, pages 260, 261, and the first 6 lines of page 262.

(i) Page 289, the last 15 lines; pages 290 to 295, inclusive.

(j) Page 307, all but first 4 lines; page 308; and page 309 all but last 3 lines.

(k) Page 316, all but first 3 lines; pages 317 to 319, inclusive; and first 3 lines of page 320.

(l) Page 360, all but first 8 lines; pages 361 to 367, inclusive; page 368 all but last 6 lines.

(m) All of pages 371 to 383, inclusive; page 384, all except last 3 lines.

(n) Page 385, all but first 5 lines; pages 386 to 438, inclusive.

(o) Page 467, all but first 4 lines; page 468; all of page 469 except last line; page 470 except first 8 lines; page 471; and first 2 lines of page 472.

(p) Page 487, all except first 5 lines; pages 488 to 505, inclusive; page 506, except last line.

4. As to Plaintiffs' Exhibit 2 (the record in *Todd* v. *Citizens Gas*), this exhibit was merely marked for identification and should not be printed, except to the extent that other exhibits hereinafter enumerated were taken therefrom.

5. As to Plaintiffs' Exhibit 3 (Appellants' Brief in *Williams* v. *Citizens Gas Company*), this exhibit was merely marked for identification and should not be printed, except to the extent that other exhibits hereinafter enumerated were taken therefrom.

6. There are no Stipulation Exhibits bearing numbers 1 to 4, inclusive, 10, 11, 12, 15 to 19, inclusive, 21, 25 to 29, inclusive, 33, 34, 41 to 46, inclusive, 51 to 54, inclusive, 57, or 71 to 74, inclusive.

7. As to Plaintiffs' Stipulation Exhibit 5, the Agreement of Lease set forth therein beginning in the middle of page 3 and continuing through the first 31 lines on page 20 should be omitted and the following inserted in lieu thereof:

"Here is inserted the proposed 'Agreement of Lease'. Said Agreement of Lease is substantially identical with the Lease finally executed between the parties, a copy of which is attached to the bill of complaint as Exhibit B thereto (I R. 51-80), with the following exceptions:

"(a) The proposed 'Agreement of Lease' did not contain:

"(I) The metes and bounds description of the Indianapolis Gas property as it appears in the 4th to 9th grammatical paragraphs, inclusive, of the executed Lease (I R. 52-4).

"(II) The 13th grammatical paragraph of the executed Lease (I R. 55).

"(III) The 3rd grammatical paragraph of Subdivision 6 of the executed Lease (I R. 58).

"(IV) The last grammatical paragraph of Subdivision 7 of the executed Lease (I R. 60).

"(V) The next to the last grammatical paragraph of Subdivision 15 of the executed Lease (I R. 66).

"(VI) All of Subdivision 16 of the executed Lease, except the first sentence thereof (I R. 66-7).

"(VII) Subdivisions 26, 27 and 27½ (containing 19 grammatical paragraphs) of the executed Lease (I R. 73-77).

"(VIII) Subdivision 31 of the executed Lease (I R. 79).

"(b) In place of the 3rd, 4th, and 5th grammatical paragraphs of Subdivision 21 of the Lease as executed (I R. 70, lines 8-43), the proposed Agreement of Lease contained the following provisions:

"'2. The Lessee will pay to the Lessor as additional rental for the demised property:

"'On the 31st day of December, 1913, the sum of ..... thousand Dollars, being at the rate of One Hundred and Twenty Thousand Dollars per year for the period from the beginning of this lease to the 1st day of January, 1914.

"'On the 30th day of June and the 31st day of December, 1914, and thereafter semi-annually on the last days of June and December of each year, the sum of Seventy Thousand Dollars, provided however when the dividends paid on the capital stock of the Lessee Company shall in any calendar year equal eight per cent of the par value thereof, thereupon in the calendar year following the semi-annual rental to be paid the Lessor shall be Eighty Thousand Dollars and being thus once fixed shall, except as hereafter provided, remain at such sum during the remainder of the term created by this lease; provided if in any calendar year during the running of this lease after the rental hereunder has reached the sum of $160,000 a

year, the earnings of the Lessee available for dividends to its stockholders shall not be sufficient to enable a dividend of eight per cent to be paid to the Lessee's stockholders (whether or not in fact such dividend be actually declared and paid), then the rental to be paid to the Lessor under this paragraph of the lease for the succeeding calendar year shall be only One Hundred and forty thousand dollars ($140,000), payable in two equal semi-annual payments, as hereinbefore provided. For any fractional six months period immediately preceding the termination of the lease, the rental shall be at the same rate as that paid for the preceding six months period.'

"(c) In place of Subdivision 22 of the Lease as executed (I R. 72), the proposed Agreement of Lease contained Subdivisions 22 and 23, reading as follows:

"'22. The Lessee covenants to perform and observe all the covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds, contained in its mortgage to the Trust Company of America, dated October 1st, 1902, securing an issue of bonds in the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000) hereinabove referred to; and also all covenants and agreements of the Lessor, except those as to the payment of the principal of the bonds contained in any refunding or renewal mortgage executed pursuant to the provisions of Article 7 of this lease.

"'As between the parties hereto it is agreed that the Lessee may at any time invest its funds in the outstanding bonds of the Lessor, but its acquirement thereof shall be not deemed a cancellation or retirement thereof unless the Lessee expressly elects to have the same cancelled or retired.

"'23. The Lessee covenants that it will upon the original or other maturity of any of the obligations secured by the aforesaid mortgage of the Lessor, or by any mortgage or mortgages taking its place, refinance such debts with new bonds secured by mortgage on the leased property, or with other obligations of the Lessor, in such manner and form as the Lessee shall deem advisable and the Lessor in writing approves, and the Lessor covenants to do such acts as may be reasonably required of it to carry out such refinancing.')".

8. Plaintiffs' Stipulation Exhibits 8 and 9 should be omitted in printing.

9. Plaintiffs' Stipulation Exhibit 30, the bill of com-

plaint in *Todd* v. *Citizens Gas Company*, appears on pages 2 to 72 of Plaintiffs' Exhibit 2 for Identification (the transcript of the record in said cause). This exhibit should be printed in full with the following exceptions:

(a) In place of the last 28 lines on page 5, all of pages 6 and 7, and the first 23 lines on page 8 insert:

"(Here follows detailed description of real estate owned by Citizens Gas Company)."

(b) In place of the last 25 lines on page 9, all of pages 10 to 21, inclusive, and all of page 22 except the last 10 lines insert:

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I R. 81-94))."

(c) In place of the last 6 lines on page 23, and all of pages 24 to 27, inclusive, insert:

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I R. 95-100))."

(d) In place of the last 21 lines on page 34, all of pages 35, 36 and 37, and the first 15 lines on page 38 insert:

"(Here follows a certificate of amendment to the Articles of Incorporation of Citizens Gas Company, filed August 27, 1921, which appears as part of Exhibit C to the bill (I R. 112-116))."

(e) In place of the last 25 lines on page 41, all of page 42, and all of page 43 except the last two lines insert:

"(Here follows the resolution adopted by the Board of Public Works on March 20, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 22)."

(f) In place of the last 26 lines on page 44 and the first 12 lines on page 45 insert:

"(Here follows the first resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 23)."

(g) In place of the last 21 lines on page 45, all of page 46, and the first 27 lines on page 47 insert:

"(Here follows the second resolution of the Board of Directors of Citizens Gas Company adopted on April 3, 1929, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 24)."

10. Plaintiffs' Stipulation Exhibit 31, the answer of

the City of Indianapolis in said Todd case, appears on pages 115 to 152 of Plaintiffs' Exhibit 2 for Identification (the record in said cause). This exhibit should be printed in full.

11. Plaintiffs' Stipulation Exhibit 32, plaintiff's amended motion to strike out portions of the answer of the City of Indianapolis, et al. in the Todd case, appears on pages 154 to 161 of Plaintiffs' Exhibit 2 for Identification. This exhibit should be printed in full with the following exceptions:

(a) Omit all but the first 5 lines on page 156 and all of page 157 except the last 6 lines and in lieu thereof insert:

"(Here follows all but the first paragraph of subdivision 8 of the answer of the City of Indianapolis, et al. in the Todd case, a copy of which answer is in evidence as Plaintiffs' Stipulation Exhibit 31)."

(b) Omit the last 32 lines on page 160 and the first 16 lines on page 161 and in lieu thereof insert:

"(Here follows all of the first paragraph of subdivision 2 of the answer of the City of Indianapolis, et al. in the Todd case (Plaintiffs' Stipulation Exhibit 31) except the first few lines of said paragraph, reading as follows: 'These answering defendants deny the allegations of Subdivision II of the complaint that the plaintiff is the owner of 250 shares of the common capital stock of defendant Citizens Gas Company of Indianapolis')."

12. Plaintiffs' Stipulation Exhibit 35, the bill of complaint in *Williams* v. *Citizens Gas Co., et al.*, appears on pages 110 (last 12 lines) to 228 (all except last 10 lines), inclusive, of Plaintiffs' Exhibit 3 for Identification (being Appellants' Brief in said cause in the Supreme Court of Indiana). This exhibit should be printed in full with the following exceptions:

(a) In place of the matter beginning on the third line of page 115 and continuing through the third line on page 132 insert:

"(Here follows the Franchise Contract of August 25, 1905, which appears as part of Exhibit C to the bill (I R. 81-94))."

(b) In place of the last 11 lines on page 132, pages 133 to 136, and the first 19 lines on page 137 insert:

"(Here follows the Articles of Incorporation of Citizens Gas Company, which appears as part of Exhibit C to the bill (I R. 95-100))."

(c) In place of the last 14 lines on page 146, pages 147 to 150, inclusive, and the first 21 lines on page 151 insert:

"(Here follows the Agreement of November 29, 1911, between the City of Indianapolis and Citizens Gas Company, modifying the Franchise Contract of August 25, 1905, which Agreement appears as part of Exhibit C to the bill (I R. 108-112))."

(d) In place of the last 8 lines on page 152, all of pages 153, 154, 155, and the first 21½ lines on page 156 insert:

"(Here follows a detailed description of the property of the Citizens Gas Company)."

(e) In place of the matter beginning on the fourth line of page 163 and continuing through page 164 insert:

"(Here follows the joint petition of Citizens Gas Company of Indianapolis and The Indianapolis Gas Company to the Public Service Commission, previously set forth as part of Plaintiffs' Stipulation Exhibit 13)."

(f) In place of the last 19 lines on page 165, all of pages 166 to 199, inclusive, and all of page 200 except the last 8 lines insert:

"(Here follows a copy of the Lease between Indianapolis Gas and Citizens Gas, a copy of which is attached to the bill as Exhibit B (I R. 51-80))."

13. Plaintiffs' Stipulation Exhibit 36, the Supplemental Complaint in *Williams* v. *Citizens Gas Co., et al.*, appears on pages 228 (last 6 lines) to 230 (first 11 lines), inclusive, of Plaintiffs' Exhibit 3 for Identification (being Appellants' Brief in said cause in the Supreme Court of Indiana). This exhibit should be printed in full.

14. As to Plaintiffs' Stipulation Exhibit 37:

(a) In subdivision 4, omit the last 26 lines on page 5 and the first 29 lines on page 5 and insert:

"(Here is quoted the first three grammatical paragraphs of subdivision (20) of the complaint in the Williams case, which complaint is set forth as Plaintiffs' Stipulation Exhibit 35))".

(b) In subdivision 6, omit lines 6 to 30 on page 8 and insert:

"(Here is quoted the last grammatical paragraph of subdivision (24) of the complaint in the Williams case, which complaint is set forth as Plaintiffs' Stipulation Exhibit 35)".

(c) In subdivision 8, omit the first 25 lines on page 10 and insert:

"(Here is quoted the last grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

(d) In subdivision (8), omit the last 24 lines on page 10 and insert:

"(Here is quoted all of subdivision (31) of the bill of complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

(e) In subdivision 9, omit all of page 12 except the last 3 lines and insert:

"(Here is quoted the first grammatical paragraph of subdivision (25) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

(f) In subdivision 10, omit lines 7 to 35 on page 13 and insert:

"(Here is quoted the next to the last paragraph of subdivision (30) of the complaint in the Williams case (Plaintiffs' Stipulation Exhibit 35))".

15. Plaintiffs' Stipulation Exhibit 38 appears in Plaintiffs' Exhibit 3 for Identification (last 3 lines on p. 232, all of pages 233 and 234, and first 10 lines on p. 235). This exhibit should be printed in full.

16. As to Plaintiffs' Stipulation Exhibit 47, in place of pages 9 to 15, inclusive, insert:

"(Here follow detailed provisions in accordance with the applicable Indiana statutes as to advertising for, making, and acceptance of bids for the City's Gas Plant Revenue Bonds)".

17. As to Plaintiffs' Stipulation Exhibit 48, in place of page 3 insert:

"(Here follows a form of 'Notice of Payment of Citizens Gas Company Mortgage Bonds', which form of Notice is identical with the Notice set forth as Plaintiffs' Stipulation Exhibit 49)".

18. As to Plaintiffs' Stipulation Exhibit 55, omit:

(a) The four "whereas" paragraphs (beginning on the third line of page 1 and continuing through the 18th line on page 2) and in lieu thereof insert:

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".

(b) Pages 3 and 4, and substitute the following:

"(Here follows a detailed description by metes and bounds of the Citizens Gas Company property)".

(c) Page 6, and substitute:

"(Acknowledgment omitted in printing)".

19. As to Plaintiffs' Stipulation Exhibit 56, omit:

(a) The first four "whereas" paragraphs (beginning on the second line of page 1 and continuing through the 16th line of page 2) and in lieu thereof insert:

"(Here follow 4 paragraphs which are identical with the first 4 paragraphs of the Assignment of Lease attached to the bill of complaint as Exhibit F (I R. 127-9))".

(b) Page 4, and insert:

"(Acknowledgment omitted in printing)".

20. As to Plaintiffs' Stipulation Exhibit 87, omit the first two "whereas" paragraphs appearing on page 1 and in lieu thereof insert:

"(Here appear 2 paragaphs which are identical with the first 2 paragraphs of Plaintiffs' Stipulation Exhibit 86)".

21. As to Plaintiffs' Exhibit 88, in place of page 2 insert:

"(Certificate to qualifications of certifying Officer omitted in printing)".

22. Plaintiffs' Exhibit 89 is the answer of the City of Indianapolis, et al., in the case of *Cotter* v. *Citizens Gas Co., et al.*, and appears in the form of a photostat of pages 73 to 104, inclusive, of the transcript of record in that case. This exhibit should be printed in full.

23. As to Plaintiffs' Exhibit 90, this should be printed in full with the exception of the last page, in lieu of which insert:

"(Here follows revenue statement of Citizens Gas Company for year ending December 31, 1918, and balance sheet as of same date)".

24. As to Plaintiffs' Exhibit 92, print only:

(a) Page 1, first 6 lines.

(b) Page 3, lines 12 to 49, inclusive (the heading "Relations with Indianapolis Gas Company" and the two paragraphs appearing immediately thereunder).

(c) Page 4, last 10 lines.

25. As to Plaintiffs' Exhibit 93, omit:

(a) Page 2, last 12 lines.

(b) All of page 3.

(c) Page 4, all except last 11 lines.

26. As to Plaintiffs' Exhibit 94, print only:

(a) Page 1, except last 11 lines.

(b) Last 11 lines of page 4.

27. As to Plaintiffs' Exhibit 95-A, print only:

(a) Line 1 and lines 7 to 25 of page 1 (page 857).

(b) Line 1 and lines 11 to 44 of page 3 (page 859).

28. As to Plaintiffs' Exhibit 96-A, print only:

(a) Line 1 and lines 19 to 44, inclusive, of page 1 (page 2310).

(b) Line 1 and lines 9 to 32, inclusive, of page 4 (page 2313).

29. As to Plaintiffs' Exhibit 97-A, print only:

(a) The heading "Citizens Gas Company of Indianapolis" on page 1 (page 54).

(b) All of first column on page 1 (p. 54) down to "Miscellaneous Statistics" and first 6 lines of second column under this heading.

(c) The third grammatical paragraph in the second column on page 1 (p. 54), being lines 19 to 24, inclusive, in said second column.

(d) From page 3 (p. 56) the heading "The Indianapolis Gas Company" and all material appearing in the column following this heading except the last 9 lines.

30. As to Plaintiffs' Exhibit 98-A, print only:

(a) Lines 1 to 25, inclusive, of page 1 (page 373).

(b) "Table A" appearing at the bottom of page 1 (page 373), including all of the remainder of page 1.

(c) The first 7 lines of page 2 (page 374).

31. Plaintiffs' Exhibits 99 to 109, both inclusive, s[illegible]d be omitted in printing and the following inserted i[illegible] thereof:

"(Plaintiffs' Exhibits 99 to 109, inclusive, ar[illegible] tostats of the pages from Moody's Manual of I[illegible]stments—Public Utility Securities—for the years 1924 to 1934, inclusive, which set forth material with respect to Citizens Gas Company of Indianapolis and The Indianapolis Gas Company. Statements appear in each of these 11 exhibits which are substantially identical with the statements quoted above from Plaintiffs' Exhibit 98-A from Moody's Manual of Investments—Public Utility Securities—for 1923)".

32. As to Plaintiffs' Exhibit 110, print only:

(a) From page 1 (page 2336) the heading at the top of

the page, "Moody's Manual of Investments", the heading "Citizens Gas Company of Indianapolis" and all material under that heading on page 1.

(b) All of page 2 (page 2337) down to the table headed "Comparative Operating Statistics, Years Ended Dec. 31".

(c) The heading at the top of page 3 (page 2338) "Moody's Manual of Investments", all the material between the end of the "Comparative Condensed Balance Sheet, as of Dec. 31" and the beginning of "Table B—Stock Records", and the note in the 2 columns preceding the last 4 lines on the page.

(d) The heading at the top of page 4 (page 2339) "Moody's Manual of Investments" and the paragraph on said page headed "Liquidating Dividend Rescinded".

33. As to Plaintiffs' Exhibits 123A, 123B and 123C:

(a) In place of the letter dated April 8, 1936 which appears in Plaintiffs' Exhibit 123A (p. 55) insert:

> "(Here appears a copy of the letter dated April 8, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which letter is in evidence as City's Stipulation Exhibit 80)".

(b) In place of the letter dated May 12, 1936 which appears in Plaintiffs' Exhibits 123A and 123B (pp. 55-56) insert:

> "(Here appears a copy of the letter dated May 12, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which letter is in evidence as City's Stipulation Exhibit 81)".

(c) In place of the letter dated May 4, 1936 which appears in Plaintiffs' Exhibit 123B (p. 56) insert:

> "(Here appears a copy of a letter dated May 4, 1936 from Baker, Hostetler, Sidlo & Patterson to The Indianapolis Gas Company)".

(d) In place of the letter dated May 12, 1936 which appears in Plaintiffs' Exhibit 123C (p. 57) insert:

> "(Here appears a copy of a letter dated May 12, 1936 from The Indianapolis Gas Company to Baker, Hostetler, Sidlo & Patterson)".

34. Omit Plaintiffs' Exhibit 124 and in lieu thereof insert:

> "(This exhibit is identical with Plaintiffs' Exhibit 93)".

35. As to Plaintiffs' Exhibit 126, in place of the last

seven grammatical paragraphs of the body of the letter, down to the date (all but the first paragraph), insert:

"(Here follows 7 paragraphs which are identical with the last 7 paragraphs in Plaintiffs' Exhibit 125)".

36. Plaintiffs' Exhibits 127, 128, 128-A, 128-B, 129 and 130 should be omitted in printing.

37. Plaintiffs' Exhibit 133 is the deposition of Robert E. Simond and the exhibits thereto, being Plaintiffs' Deposition Exhibits 101 to 116-B and City's Deposition Exhibits 1 to 5. This exhibit should be printed in full with the following exceptions:

(a) Omit the entire "Notice of Intention to Take Depositions upon Oral Examination" in cause 1844 (2 pages), the entire "Proof of Service of Notice of Intention to Take Depositions" in cause 1844 (1 page), the entire "Notice of Intention to Take Depositions upon Oral Examination" in cause 1950 (2 pages), and the entire "Proof of Service of Notice of Intention to Take Depositions" in cause 1950 (1 page), all of which appears as part of said exhibit prior to the deposition itself. In lieu thereof insert:

"(Notice to take Deposition, and Proof of Service thereof omitted in printing)".

(b) Omit page 1 of deposition except last 5 lines.

(c) Omit pages 3 and 4 of deposition and insert:

"(Stipulation as to waiver of notice, waiver of signature, etc., omitted in printing)".

(d) Omit pages 69 and 70 of deposition and insert:

"(Certification of notary to deposition omitted in printing)".

(e) Omit Plaintiffs' Deposition Exhibit 102 and insert:

"(Plaintiffs' Deposition Exhibit 102 is identical with Exhibit B attached to the Answer and Counter-Claim of the City of Indianapolis, et al., (I R. 192-199))".

(f) As to Plaintiffs' Deposition Exhibit 103 omit:

(i) All of page 1 except the heading "Re: City of Indianapolis, Indiana Gas Plant Revenue 4½% Bonds".

(ii) All of page 2 except the heading "Acquisition of Gas Properties" and the material appearing under said heading.

(iii) All of page 3 except last 21 lines.

(iv) All of pages 4, 5, 6 and 7.

(v) All of page 8 except last 3 lines and date.

(g) In place of Plaintiffs' Deposition Exhibit 106 insert:

"(Plaintiffs' Deposition Exhibit 106 is identical with City's Exhibit 11)".

(h) As to Plaintiffs' Deposition Exhibit 110, print only:

(i) The title page, all of page 1, and all of page 2 except last 10 lines.

(ii) The last 3 lines on page 3 and all of pages 4 and 5.

(i) As to Plaintiffs' Deposition Exhibit 114, reproduce in full by photolithographic or other similar process.

(j) Omit all of Plaintiffs' Deposition Exhibit 115 and in lieu thereof insert:

"(Plaintiffs' Deposition Exhibit 115 is the report of Arthur Mullergren and Company dated June 22, 1935. The testimony concerning this report appears in the deposition of R. E. Simond, Plaintiffs' Exhibit 133)".

(k) Omit Plaintiffs' Deposition Exhibit 116-A and substitute:

"(Plaintiffs' Deposition Exhibit 116-A is identical with Plaintiffs' Deposition Exhibit 104)".

(l) Omit Plaintiffs' Deposition Exhibit 116-B and substitute:

"(Plaintiffs' Deposition Exhibit 116-B is identical with Plaintiffs' Deposition Exhibit 105)".

38. Plaintiffs' Exhibit 134 is the deposition of Chester M. Clark and Joseph Edwards Baker, together with Plaintiffs' Deposition Exhibits 1 to 12, inclusive, and should be printed in full except as follows:

(a) Omit the entire "Certificate of Notary Taking Depositions" (3 pages), which appears prior to the depositions themselves, and in lieu thereof insert:

"(Certificate of notary omitted in printing)".

(b) Omit all of page 1 of the depositions except the last 10 lines.

(c) Omit the Index of Witnesses at the end of the depositions.

(d) Omit Plaintiffs' Deposition Exhibits 1 and 2, and insert:

"(Stipulation and notice re taking deposition omitted in printing.)"

(e) Reproduce Plaintiffs' Deposition Exhibits 3 to 9, inclusive, by photolithographic or some other similar process.

(f) Omit Plaintiffs' Deposition Exhibits 11 and 12.

39. As to Plaintiffs' Exhibit 135, mark at the head of the exhibit "Excluded by District Court" and print only the following:

(a) The cover, pages 1 and 2, and page 3 except last 9 lines.

(b) Heading "C", in black face type on page 5.

(c) The last 11 lines on page 6.

(d) The last 4 lines on page 7 and all of page 8 except last 2 lines.

(e) The heading "No Right to Receivership is Shown" on page 10, the last 2 lines on page 10, and the first 10 lines on page 11.

(f) All of page 13 and all of page 14 except last 8 lines.

(g) Lines 6 to 14, inclusive, on page 15.

(h) The heading "D." in black face type on page 16, the heading "E." in black face type on page 23 and the heading "F." in black face type on page 25.

(i) All of page 27, all of page 29 except the first 8 lines, all of page 30 and all of page 31 except the last 10 lines.

(j) The last 5 lines on page 33 and the first 11 lines on page 34.

(k) All of page 38 except the first 6 lines, all of pages 39 and 40 and the first 9 lines on page 41.

(l) The last 16 lines on page 41 and all of pages 42 to 46, inclusive.

40. Omit Plaintiffs' Exhibits 136, 137, and 138.

41. Plaintiffs' Exhibit 139, the stipulation in *Todd v. Citizens Gas Company, et al.*, appears on pages 186 to 248 of Plaintiffs' Exhibit 2 for Identification (the transcript of record in said cause). This exhibit should be omitted entirely in printing with the following exceptions:

(a) The caption and introductory paragraph (first 15 lines on p. 186).

(b) Subdivision 2(d) (last 22 lines on p. 190 and first 2 lines on p. 191).

(c) Subdivisions 4 and 5 and the first paragraph of sub-

division 6 (all of p. 192 except first 5 lines, and the first 20 lines on p. 193).

(d) Subdivision 8 (lines 9-19 on p. 197).

(e) The 4th and 5th paragraphs of subdivision 9(a) (last line on p. 197 and the first 7 lines on p. 198).

(f) Subdivision 9(d) (last 27 lines on p. 200 and first 25 lines on p. 201).

(g) Subdivision 13 and 14 (all of p. 234 except first 14 lines, and first 16 lines on p. 235).

(h) Subdivisions 19, 20 and 21 (lines 6-37 on p. 236).

(i) The concluding paragraph of the stipulation and the signatures thereto (last 11 lines on p. 247 and all of p. 248). A typewritten transcript of this exhibit as it is to be printed under the terms of this Stipulation has been prepared for the convenience of the Clerk and the printer and is attached to this Stipulation, marked "Plaintiffs' Exhibit 139."

42. Omit City's Exhibit C.

43. As to City's Exhibit 1, omit certificate of Marion County Circuit Judge (last 20 lines on page 2) and substitute:

"(Certificate to qualifications of certifying officer omitted in printing)".

44. As to City's Exhibit 2, omit page 3 and substitute:

"(Certificate to qualifications of certifying officer omitted in printing)".

45. As to City's Exhibit 3, omit last 11 lines of page 2 and all of page 3 and substitute:

"(Certificate to qualifications of certifying officer omitted in printing)".

46. As to City's Exhibit 4, omit last 9 lines on page 2 and all of page 3 and substitute the following:

"(Certificate to qualifications of certifying officer omitted in printing)".

47. Print only the following portions of City's Exhibit 5A:

(a) The heading on page 1.

(b) Interrogatories 23 to 45, inclusive, (all of pages 7 to 11, inclusive).

48. Print only the following portions of City's Exhibit 5B:

(a) All of page 1, except the title of the cause and the last 11 lines.

(b) Answers 23 to 45, inclusive, (last 8 lines on page 6, all of page 7, all of page 8 except last 4 lines).

(c) In place of the verification (pp. 10 and 11) insert:
"(Verification of William J. Yule, Secretary of The Indianapolis Gas Company, omitted in printing)."

(d) In place of Exhibits 1 to 34, inclusive, attached to these answers to interrogatories substitute the following:

"Here follows Exhibit 1, letter dated July 23, 1935, from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is in evidence as Plaintiffs' Stipulation Exhibit 58.

"Exhibits 2 to 5, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties.

"Exhibits 6 to 19, inclusive, to these answers to interrogatories, appear elsewhere in the record as follows:

"Exhibit to Indianapolis Gas answers No.	Appears in the Record as
6	Plaintiffs' Exhibit 121.
7	Exhibit 4 to plaintiff's answers to interrogatories.
8	Exhibit 6 to plaintiff's answers to interrogatories.
9	Exhibit 7 to plaintiff's answers to interrogatories.
10	Exhibit 12 to plaintiff's answers to interrogatories.
11	Plaintiffs' Exhibit 111A.
11	Plaintiffs' Exhibit 111B.
12	Plaintiffs' Exhibit 112.
12	Plaintiffs' Exhibit 112A.
13	Plaintiffs' Exhibit 113.
14	Plaintiffs' Exhibit 114.
15	Plaintiffs' Exhibit 115.
16	Plaintiffs' Exhibit 116.
17	Plaintiffs' Exhibit 117.
18	Plaintiffs' Exhibit 118.
19	Plaintiffs' Exhibit 119.

(Plaintiff's answers to the interrogatories propounded to it, and the exhibits thereto, are in evidence as City's Exhibit 6B.)

"Exhibits 20 to 34, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties."

49. Print only the following portions of City's Exhibit 6A:

(a) The heading on page 1.

(b) Interrogatories 21 to 34, inclusive (last 2 lines on page 5, all of pages 6 and 7, and first 11 lines on page 8).

50. Print only the following portions of City's Exhibit 6B:

(a) All of page 1, except the title of the cause and the last 6 lines.

(b) Answers 21 to 34, inclusive, (all of page 3 and the first 7 lines on page 4).

(c) In place of the verification (page 6) insert:

"(Verification of Paul C. Beardslee omitted in printing)".

(d) In place of Exhibits 1 to 3 insert:

"(Exhibits 1 to 3, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties)".

(e) Exhibits 4 to 12, inclusive, and Exhibits 12A and 12B to the answers.

(f) In place of Exhibits 13 to 24, inclusive, to the answers insert:

"(Exhibits 13 to 24, inclusive, to plaintiff's answers to the interrogatories propounded to it appear elsewhere in the record as follows:

Exhibit to Plaintiff's Answers No.	Appears in the Record as Plaintiffs' Exhibit No.
13	111A
14	111B
15	111C
16	112
17	112A
18-24, inclusive	113-119, inclusive)".

(g) In place of Exhibits 25 to 45 insert:

"(Exhibits 25 to 45, attached to these answers to interrogatories, have been omitted in printing by agreement of the parties)".

51. As to City's Exhibit 7-A:

(a) Omit on page 1 (page 37) letter of July 23, 1935, and substitute:

"(Here follows copy of letter of July 23, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 58)".

(b) Omit on page 1 (page 37) letter of August 31, 1935, and substitute:

"(Here follows copy of letter of August 31, 1935, which

letter appears above as Plaintiffs' Stipulation Exhibit 59)".

(c) Omit letter of September 9, 1935 on page 2 (page 38) and substitute:

"(Here follows copy of letter of September 9, 1935, which letter appears above as City's Stipulation Exhibit 60)".

(d) Omit Resolution for Rejection of Assignment of Lease: Rejection of Assignment of Lease, and Resolution for Temporary Use of Property of Indianapolis Gas Company, appearing on pages 2, 3, 4 and 5 (pages 38-41) and substitute:

"(Here follows copy of resolution for rejection of assignment of lease, rejection of assignment of lease, and resolution for temporary use of property of Indianapolis Gas Company, copies of which are attached to the answer and counterclaim of the City of Indianapolis, et al. as Exhibit C (I R. 200-204)".

(e) Omit first letter of September 24, 1935 on page 6 (page 42) and substitute:

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 62)".

(f) Omit second letter of September 24, 1935, on page 6 (page 42) and substitute:

"(Here follows copy of letter of September 24, 1935, which letter appears above as City's Stipulation Exhibit 61)".

52. As to City's Exhibit 7-B:

(a) Omit first letter of September 30, 1935 on page 1 (page 43) and substitute:

"(Here follows copy of letter of September 30, 1935, which letter appears above as Plaintiffs' Stipulation Exhibit 66)".

(b) Omit second letter of September 30, 1935 on page 2 (page 44) and substitute:

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 64)".

(c) Omit third letter of September 30, 1935, on page 2 (page 44) and substitute:

"(Here follows copy of letter of September 30, 1935, which letter appears above as City's Stipulation Exhibit 65)".

53. As to City's Exhibit 7C, omit the letter from The

Indianapolis Gas Company to the Chase National Bank and in lieu thereof insert:

"(Here follows a form of letter from The Indianapolis Gas Company to the Chase National Bank Company, which is identical with the letter of November 7, 1935, a copy of which is set forth as Plaintiffs' Exhibit 116)".

54. As to City's Exhibit 7D, in place of the letter of March 2, 1936 (all of p. 1 (p. 51) except first 16 lines, and all of p. 2 (p. 52) except last 15 lines) insert:

"(Here appears a copy of the agreement of March 2, 1936 between The Indianapolis Gas Company and the Department of Utilities of the City of Indianapolis, a copy of which appears as part of Exhibit E to the answer and counter-claim of the City of Indianapolis, et al. (I R. 205-207))".

55. As to City's Exhibit 7E:

(a) Omit the letter dated March 20, 1936 on page 1 (p. 53) and in lieu thereof insert:

"(Here appears a copy of letter dated March 20, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 78)".

(b) Omit the letter from The Indianapolis Gas Company to Thompson, Rabb & Stevenson on pages 1 and 2 (pp. 53-54) and in lieu thereof insert:

"(Here follows a form of letter from the Indianapolis Gas Company to Thompson, Rabb & Stevenson, which is identical with the letter of April 6, 1936, a copy of which is set forth as City's Stipulation Exhibit 79)".

56. No Exhibit 7F was offered in evidence by the City.

57. As to City's Exhibit 7G:

(a) Omit the letter dated May 23, 1936 and in lieu thereof insert:

"(Here appears a copy of letter dated May 23, 1936 from Thompson, Rabb & Stevenson to The Indianapolis Gas Company, a copy of which is set forth as City's Stipulation Exhibit 82)".

(b) Omit the letter dated June 3, 1936 and in lieu thereof insert:

"(Here appears a copy of letter dated June 3, 1936 from The Indianapolis Gas Company to Thompson, Rabb & Stevenson, a copy of which is set forth as City's Stipulation Exhibit 84)".

58. Print City's Exhibit 8 in full, with the following exceptions:

(a) Omit all of page 1 except the first 5 lines, all of page 2, and all of page 3 except the last 10 lines, and substitute in lieu thereof:

"(The part here omitted recites in appropriate 'Whereas' clauses certain historical facts in regard to Citizens Gas Company and its relationship to the City of Indianapolis, which appear elsewhere in this record)".

(b) Omit page 6 except first 2 lines and insert:

"(Certificate of City Clerk omitted in printing)".

59. Omit City's Exhibit 9 and substitute the following:

"(This exhibit entitled 'Rejection of Assignment of Lease and Refusal to Assume, Take Over, or be Bound Thereby' appears as part of paragraph 5 of the Resolution for Rejection of Assignment of Lease which is part of Exhibit C to the answer and counterclaim of City of Indianapolis, et al. (I R. 203-4))".

60. As to City's Exhibit 11, omit all except:

(a) The cover or title page.

(b) Pages 57, 58 and 59.

(c) Page 71.

At the end of the Exhibit insert:

"(Only those parts of the transcript which are material to the present appeal have been printed)".

61. As to City's Exhibit 12:

(a) In place of pages 182-184, inclusive, insert:

"(Here follows a certified copy of a resolution of the Board of Directors of the Citizens Gas Company as to the irrevocability of certain trust deposits for the payment of the preferred and common stock of said Company)".

(b) Omit all of page 226 except the first six lines and all of pages 227-235, inclusive, and in lieu thereof insert:

"(Here appears several miscellaneous resolutions relating to the affairs of the Department of Utilities of the City of Indianapolis, none of which resolutions is material to this appeal)".

62. Omit City's Exhibits 13B, 14 (two letters), 15 (three letters), 16 to 24, inclusive, 25A, 25B, 26 and 27.

63. Omit all of City's Exhibit 30 and in lieu thereof insert:

"(City's Exhibit 30 is a typewritten statement offering various exhibits on behalf of plaintiff. Copies of this statement were furnished to the Court and counsel and the

statement was read into the record just prior to the calling of the first witness, Franklin Vonnegut)".

Dated November 10th, 1939.

William L. Taylor,
Howard F. Burns,
John Adams,
Solicitors for Plaintiff-Appellant.
Edward H. Knight,
Corporation Counsel of Indianapolis.
Michael B. Reddington,
City Attorney of Indianapolis.
W. H. Thompson,
Patrick J. Smith,
Solicitors for the City of Indianapolis and the individual defendants who are members of the Board of Trustees or of the Board of Directors for Utilities of the City of Indianapolis.
Wm. R. Higgins,
Louis B. Ewbank,
Solicitors for defendant, The Indianapolis Gas Company.
Davis, Pantzer, Baltzell & Sparks,
by William G. Sparks,
Solicitors for defendant, Citizens Gas Company of Indianapolis.

PLAINTIFFS' EXHIBIT 139.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

Newton Todd, *Plaintiff.*
vs.
Citizens Gas Company, *et al.*, *Defendants.*
In Equity No. 1191.

STIPULATION OF FACTS

The parties hereto agree that for the purpose of the trial and final hearing of this case, the following facts, in addition to those admitted in the answers, are true. All parties reserve the right to object to the introduction of any part of this stipulation on any ground other than that the facts therein contained have not been established by the best evidence.

* * * * * *

(2) (d). Plaintiff, Newton Todd, brought and has maintained this suit on behalf of himself and other holders of certificates issued by said Board of Trustees who may wish to join in this suit and contribute to the expense thereof, and plaintiff, Newton Todd, in this suit, is asserting what he claims are corporate rights and immunities of the Citizens Gas Company of Indianapolis. At the time of the commencement of this action and now, there were and are approximately 1400 persons who were the owners and holders of such Certificates issued by said Board of Trustees, and in whose names stock certificates were issued by Citizens Gas Company as aforesaid. Plaintiff, Newton Todd, asserts in this suit that rights guaranteed by the Constitution of the United States to Citizens Gas Company and to him and other holders of certificates issued by said Board of Trustees, are being violated by acts of the defendants, under color of certain statutes of the State of Indiana, and seek to enjoin such acts and asks for a decree quieting title of the Citizens Gas Company to certain real and personal property situated within the Southern District of Indiana. The claims of the plaintiff, Newton Todd, with respect to the violation of his constitutional rights and those of other holders of Certificates issued by said Board

of Trustees and of the Citizens Gas Company are denied by the defendants.

* * * * * *

4. Defendant Citizens Gas Company of Indianapolis, during its corporate existence, has acquired title to and is now the owner of certain real estate, together with the buildings, fixtures, machinery and equipment used and useful for the manufacture, storage and distribution of artificial gas and the by-products thereof, together with pipe lines, mains and other equipment necessary for distributing artificial gas in the City of Indianapolis, and also a manufacturing plant and ovens for the production, manufacture and sale of commercial coke. Said real estate is situated in the City of Indianapolis, Marion County, State of Indiana, and within the jurisdiction of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and said property, so situated, is correctly described in Paragraph IV of the Bill of Complaint.

Defendant Company owns all of the capital stock of Milburn-By-Products Coal Company, a corporation, which has acquired title to and now owns certain leasehold rights in coal lands located in the Counties of Raleigh and Fayette, in the State of West Virginia, used and useful for the purpose of mining and producing therefrom coal for use in the operation of the business of defendant Company which leaseholds are those referred to in Paragraph VI of the bill of complaint. Defendant Company also is the owner of a certain leasehold estate in and to the property of the Indianapolis Gas Company, as created by a certain contract of lease for ninety-nine years dated September 30, 1913, and recorded in Miscellaneous Record 78, pages 257-278, inclusive, of the records in the Recorder's office of Marion County, State of Indiana.

Said Indianapolis Gas Company was organized as an Indiana corporation for the purpose of furnishing artificial gas in the City of Indianapolis on the 10th day of January, 1881, and continued actively in business, until the execution of the lease aforesaid, under a franchise granted to its predecessor in title by ordinance of the City of Indianapolis on the 3rd day of April, 1876. On the 7th day of October, 1913, said Indianapolis Gas Company surrendered said Franchise in accordance with the provisions of the Shively-Spencer Utility Commission Act described in Stipulation 10 hereof, and in lieu thereof accepted an Indeterminate Permit. Said Indianapolis Gas Company

now owns, subject to said lease, the legal title in 518.10 miles of gas mains and pipes in the central portion of the city, and said Citizens Gas Company now owns 328.85 miles of gas mains and pipes within such city.

5. This suit is not a collusive one to confer jurisdiction on a court of the United States of a suit of which it would otherwise not have cognizance.

6. On the 25th day of August, 1905, the Common Council of the City of Indianapolis passed an ordinance ratifying, confirming and approving a certain Franchise Contract executed on the 25th day of August, 1905 by and between the Board of Public Works of said City, and Alfred F. Potts, Frank D. Stalnaker and Lorenz Schmidt, contracting for themselves and their associates and assigns, which said ordinance was approved by the Mayor of said City and became effective on the 30th day of August, 1905. Said Franchise Contract and Ordinance ratifying the same are correctly set out in Paragraph VI of the Bill of Complaint.

* * * * * *

8. On the 24th day of May, 1906, the said Alfred F. Potts, Frank D. Stalnaker, and Lorenz Schmidt, who were the parties named in the Franchise set out in Stipulation 6 hereof, assigned and transferred to the defendant, Citizens Gas Company of Indianapolis, all of their rights in the aforesaid Franchise Contract, which assignment was accepted by the defendant company, and said defendant company continuously thereafter operated under said Franchise until it surrendered the same as hereinafter stated, and said defendant has had no other franchise granted by the City of Indianapolis.

* * * * * *

(9. (a)) Said company is to be formed on the plans set forth in said franchise for the protection of the public interests, with authority to pay its stockholders dividends of 10% per annum payable semi-annually.

Said company is to accept and operate under said franchise, and may acquire, through the city or by purchase, the pipe lines and other property lately operated by the Consumers Gas Trust Company in said City.

* * * * * *

(d) Some subscriptions were also received in consideration of making extensions of the gas mains to reach the property of certain subscribers, which subscriptions were accepted on condition that enough subscriptions be obtained to warrant the proposed extensions. Such subscriptions were taken on a form which is as follows:

"Subscription to Stock of
Citizens Gas Company of Indianapolis
Temporary Office 1201 Law Building
New Phone 361

Trustees	Directors
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

I hereby subscribe for and agree to take ..... shares (par value $25.00 each) of the capital stock of the Citizens Gas Company of Indianapolis, and to pay for the same at the rate of $25.00 per share to the Union Trust Company of Indianapolis, Trustee for said Citizens Gas Company as follows: 10 per cent on demand, and 20 per cent on the 10th day of each month thereafter (except that the last payment shall be 30 per cent) until the full amount of said subscription shall have been paid.

All money paid on this subscription shall be held by the Union Trust Company, Trustee, until the first installment of 10 per cent shall have been paid on not less than $500,000 of subscriptions; but if for any reason such installment shall not be paid by October 31, 1906, then the full amount of money paid on this subscription shall be returned to subscriber by said Union Trust Company Trustee.

"I hereby agree that the stock above subscribed shall be issued to a board of five trustees, named in the articles of incorporation of said company, in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the articles of incorporation under which said company is formed; and that when the indebtedness of said company is fully paid, and the subscribers shall have received an amount equal to the amount by them subscribed and paid, with dividends equal to 10% per annum, then the trustees and directors shall execute proper instruments transferring all the property of said company of every kind and description, to the city of Indianapolis; and that thereupon all my interest in said company and all its property shall thereby be cancelled, released and extinguished."

Name .....
Address .....

Date .....

Oct. 30, 1907
Pay no money to solicitors."

13. At the Seventy-sixth General Assembly of the State of Indiana, held during the early part of the year 1929, there was adopted a bill which was published as Chapter 78, pages 268-271, Acts 1929, the title of which is as follows:

"A Bill for an Act relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporations to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency."

Said bill was prepared by the legal department and special counsel of the City of Indianapolis employed for the purpose of bringing about a transfer of the plant and property of the defendant, Citizens Gas Company of Indianapolis, to the City of Indianapolis; said bill was introduced in the House of Representatives of the General Assembly by members residing in the City of Indianapolis and elected from Marion County and was passed in the exact form prepared and submitted by said counsel for the defendant City without change or amendment of any kind or character. Said bill contained an emergency clause providing for its taking effect immediately upon its passage, was approved on the 11th day of March, 1929, and, so far as it was valid, became a law on said day.

14. On the 20th day of March, 1929, the defendant City of Indianapolis, acting only by and through its Board of Public Works, but without any action thereon by its Common Council and without an election thereon by the qualified voters of said City, passed a resolution asserting a right to acquire the plant and property of the defendant, Citizens Gas Company of Indianapolis. Said resolution is correctly set out in Paragraph XIV of the Bill of Complaint. Defendant City of Indianapolis served said resolution upon the defendant Citizens Gas Company of Indianapolis, its directors and trustees, on said 20th day of March, 1929. Defendant City of Indianapolis through its agents and employees, on said 20th day of March, 1929, served a copy of said resolution upon the defendants Citizens Gas Company of Indianapolis, its officers, the members of its Board of Directors and the members of its Board of Trustees.

* * * * * *

19. After the passage of the ordinance of August 30, 1905 and the incorporation of the Citizens Gas Company on May 23, 1906, the City of Indianapolis took no affirmative steps in its own behalf in connection with the taking over of the property of the Citizens Gas Company until the 20th day of March, 1929. Defendant City of Indianapolis has not proceeded under the terms of said Shively-Spencer Utility Commission Act in making its aforesaid demand, and the Public Service Commission of Indiana has neither ordered nor approved the acquisition by defendant City of said plant and property nor determined the value of said plant and property nor fixed the terms and conditions of said acquisition.

20. At no time has the question of the acquisition of the plant and property of defendant, Citizens Gas Company of Indianapolis, by defendant City been submitted to the qualified voters of said City at a special or general election.

21. The directors of the defendant company have caused the two resolutions set out in Stipulation 15 hereof to be printed and mailed to all holders of certificates issued by said Board of Trustees of the Citizens Gas Company, including plaintiff; said resolutions Nos. 1 and 2 have been published in the newspapers of Indianapolis and elsewhere and said directors have publicly expressed their intention of acceding to the demands of the defendant City and of conveying the plant and property of the defendant company to the City in accordance with the notice, resolution and demand set out in Stipulation 14 hereof. The directors and trustees of the Citizens Gas Company intend to and will carry out their expressed intention and will convey said plant and property of the defendant company pursuant to said demand by the defendant City unless enjoined and restrained from such action.

* * * * * *

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreeing as to any legal rights resulting therefrom, and in particular are not agreeing as to the rights flowing to plaintiff and other holders from the issuance of the certificates in the forms set forth in Stipulations 2(b) and 2(c) hereof, nor as to the relation to the Citizens Gas Company of plaintiff and others to whom such certificates were issued; but said legal rights and relations are to be determined by the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have the right at the final hearing to introduce any additional or further evidence in this cause, providing that

the same is not in contradiction of any of the facts herein stated.

Frederick E. Matson,
Earl B. Barnes,
Austin V. Clifford,
Attorneys for Plaintiff, Newton Todd.
Edw. H. Knight,
John W. Holtzman,
Fred C. Gause,
Attorneys for City of Indianapolis; Reginald Sullivan, as Mayor of the City of Indianapolis, Henry O. Goett, as City Clerk of the City of Indianapolis, and E. Kirk McKinney, Louis G. Brandt and Charles O. Britton, as and constituting the Board of Public Works of the City of Indianapolis.
Thompson, Rabb & Stevenson,
Smith, Remster, Hornbrook & Smith,
Attorneys for Citizens Gas Company of Indianapolis, John R. Welch, Gustav A. Efroymson, Henry H. Hornbrook, William H. Insley, Clarence L. Kirk, James H. Hooker, Franklin Vonnegut, James I. Dissette, Edgar H. Evans; Gustav A. Schnull, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Otto Lieber, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Frank C. Dailey, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Thomas L. Sullivan, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis; Henry Kahn, individually and as voting trustee of the common stock of the Citizens Gas Company of Indianapolis.

Endorsed: Filed November 22, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1939, there was filed in the office of the Clerk of this Court in cause No. 7143, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York, Trustee,
Plaintiff-Appellant,

vs.

Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

The Clerk will enter our appearances as counsel for the Plaintiff-Appellant.

John Adams,
Howard F. Burns,
1956 Union Commerce Bldg.,
Cleveland, Ohio.

Endorsed: Filed November 22, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of November, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York,
Plaintiff-Appellee,

vs.

The Indianapolis Gas Co.,
Defendant-Appellant.

The Clerk will enter our appearances as counsel for the Plaintiff-Appellee.

John Adams,
Howard F. Burns,
1956 Union Commerce Bldg.,
Cleveland, Ohio.

Endorsed: Filed November 27, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-eighth day of November, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York,
Plaintiff-Appellant,

vs.

The Indianapolis Gas Company, *et al.*,
Defendant-Appellant.

The Clerk will enter our appearances as counsel for the Defendant-Appellant, The Indianapolis Gas Company.

Louis B. Ewbank,
1311 Fletcher Trust Bldg.,
Indianapolis, Ind.
William R. Higgins,
11 N. Penn St.,
Indianapolis, Ind.

Endorsed: Filed November 28, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-sixth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

Citizens Gas Co. of Indianapolis, *et al.*

The Clerk will enter our appearances as counsel for the Citizens Gas Co. of Indianapolis.

Paul Y. Davis,
Kurt F. Pantzer,
Ernest R. Baltzell,
William G. Sparks.

Endorsed: Filed December 26, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

Citizens Gas Co. of Indianapolis, *et al.*

The Clerk will enter our appearances as counsel for the City of Indianapolis and the individuals who are members of the Board of Trustees and Directors of the Department of Utilities of said City.

William H. Thompson,
Patrick J. Smith,
1350 Consolidated Bldg.,
Indianapolis, Indiana.

Endorsed: Filed December 26, 1939. Frederick G. Campbell, Clerk.

And afterwards, to wit: On the twenty-eighth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York, Trustee, etc.,

Plaintiff-Appellant,

vs.

Citizens Gas Company of Indianapolis, *et al.*,

Defendants-Appellees.

The Clerk will enter my appearance as counsel for the Chase National Bank of the City of New York, Trustee.

Harry J. Elam,
129 E. Market St.,
Indianapolis, Indiana.

Endorsed: Filed December 28, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-eighth day of December, 1939, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellee,

vs.

The Indianapolis Gas Company,
Defendant-Appellant.

The Clerk will enter my appearance as counsel for the Chase National Bank of the City of New York, Trustee.

Harry J. Elam,
129 E. Market St.,
Indianapolis, Indiana.

Endorsed: Filed December 28, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the seventeenth day of January, 1940, there was filed in the office of the Clerk of this Court, in cause No. 7143, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7143. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

Citizens Gas Co. of Indianapolis, *et al.*

The Clerk will enter my appearance as counsel for the plaintiff-appellant.

William L. Taylor,
Indianapolis, Indiana.

Endorsed: Filed January 17, 1940. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the seventeenth day of January, 1940, there was filed in the office of the Clerk of this Court, in cause No. 7144, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7144. October Term, 1939.

The Chase National Bank of the City of New York,

vs.

The Indianapolis Gas Company.

The Clerk will enter my appearance as counsel for the plaintiff-appellee.

William L. Taylor,
Indianapolis, Indiana.

Endorsed: Filed January 17, 1940. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twelfth day of April, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, April 12, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel and these appeals now come on for oral argument by Mr. Howard F. Burns, counsel for The Chase National Bank of the City of New York, Trustee, by Mr. Louis B. Ewbank, counsel for The Indianapolis Gas Company, by Mr. William H. Thompson, counsel for The City of Indianapolis, et al., and by Mr. William G. Sparks, counsel for Citizens Gas Company of Indianapolis, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the sixth day of June, 1940, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 7143, 7144. October Term, 1939, April Session, 1940.

No. 7143.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellant,
vs.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Defendants-Appellees.

No. 7144.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellee,
vs.
THE INDIANAPOLIS GAS COMPANY,
Defendant-Appellant.

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

June 6, 1940.

Before MAJOR and KERNER, *Circuit Judges* and IGOE, *District Judge.*

KERNER, *Circuit Judge.* This action was brought by Chase National Bank (as trustee under a deed of trust) against (1) the city of Indianapolis and the individual members of its Board of Trustees and its Board of Directors for Utilities, (2) the Citizens Gas Company and (3) the Indianapolis Gas Company. Hereafter Chase National Bank will be referred to as "Chase"; defendant (1) as the "City"; defendant (2) as the "Citizens Gas"; and defendant (3) as the "Indianapolis Gas."

Chase sued as trustee under a mortgage deed of trust securing the payment of principal and interest of the mort-

gage bonds of Indianapolis Gas. Among other things Chase sought to recover judgment for the overdue interest on the bonds against all of the defendants and also against the property formerly owned by Citizens Gas and now owned and operated by the City. Chase also sought a declaratory judgment holding that a certain lease hereafter described is binding on all the defendants and the property just referred to.

The cause was tried by the District Court who made special findings of fact and pronounced its conclusions of law thereon. In substance the Court concluded that the lease in question was invalid, and that Chase recover the sum of $1,032,150 from Indianapolis Gas (this being the amount of overdue and unpaid coupons on the Indianapolis Gas bonds at the time of the Court's decree). Chase and Indianapolis each prosecuted separate appeals from the Court's decree. These appeals have been consolidated and are now before this Court.

Both Chase and Indianapolis Gas contend that the District Court erred in holding the lease invalid and not binding on Citizens Gas and the City. Moreover Chase contends that the District Court erred in failing to render judgment for unpaid coupons against *all* the defendants and the property referred to above. These contentions and others as well shall be considered in the course of the opinion. Now we shall relate the pertinent facts which on the whole are not in dispute.

Natural gas was discovered in Indiana in 1886 several miles from Indianapolis. At that time the only gas plant in the City was that of Indianapolis Gas, which supplied artificial gas. Shortly after natural gas was discovered, Indianapolis Gas acquired all the natural gas lines extending from the city to the producing field. The people feared a possible monopoly by Indianapolis Gas. This led to the birth of the Consumers' Gas Trust Company, organized in 1887 for the purpose of furnishing natural gas. For more factual detail, see *Consumers' Gas Trust Company* v. *Quinby*, 137 F. 882; *Todd* v. *Citizens' Gas*, 46 F. (2) 855, 859-860.

In 1902 Indianapolis Gas executed a mortgage to secure the payment of bonds issued and to be issued in the future. The mortgage contained an after-acquired property clause, and Chase is now the sole trustee under the

mortgage deed of trust. Originally $4,000,000 bonds were issued. Later more bonds were issued, and now there are bonds outstanding in the amount of $6,881,000. For more factual detail, see *Chase Nat. Bank* v. *Citizens Gas,* 96 F. (2) 363, 364.

The Consumers' Gas Trust Company conducted its gas business until 1904, when the natural gas field failed. This marked the corporate death of this company, for the manufacture and sale of artificial gas was beyond the scope of its charter. *Quinby* case, 137 F. 882. At this time the City's right to purchase this plant arose, and the doubt was resolved in the City's favor. *City of Indianapolis* v. *Consumers' Gas Trust Co.,* 144 F. 640. See also Act of 1905, Ind., pp. 247, 252, 279, 280, 396, 434; *Todd* case, *supra,* pp. 857-858. The City did not purchase the plant, however, but the circumstances at this time gave birth to Citizens Gas (as shall be described below).

On August 25, 1905 the City passed its "franchise ordinance," by virtue of which it entered into a franchise contract granting the right to carry on the business of manufacturing and distributing artificial gas to the City and its inhabitants for 25 years. This franchise was granted on the express condition that the grantees would organize a corporation to which the franchise would be assigned and whose charter would include certain specified provisions. In 1906 Citizens Gas was organized and to it was assigned the franchise just mentioned. The provisions required to be embodied in the charter, described below, in the main related to the capital stock, the creation of the voting trust and the duty of the trustees to convey the plant to the city upon certain conditions.

Citizens Gas was organized for a corporate term of 50 years for the purpose of supplying the city of Indianapolis with light, heat and power. The capital stock was issued immediately and then turned over to the trustees, and certificates of equitable ownership were delivered to the owners of the stock. The trustees and directors elected by them were to operate the gas plant until the time came for them to convey the property to the City. The duty to convey was dependent upon the receipt by the certificate holders of an amount equal to their investment plus a return of 10% per year thereon. Upon

the satisfaction of the claims of the certificate holders, the plant and property of Citizens Gas was to be conveyed to the City subject to all outstanding legal obligations of the company.[1]

Once organized Citizens Gas purchased the gas plant property of Consumers Gas Trust Company and soon this public utility was actively engaged in the business of manufacturing and distributing gas. As such, Citizens Gas became "amenable to the law [of Indiana] to the same extent as any other public utility." *Williams* v. *Citizens Gas*, 206 Ind. 448, 457. Also "the Citizens Gas Company, as a public utility, had the privilege of surrendering its franchise and the right to receive an indeterminate permit," *Williams* case, *supra* p. 458, and this it did in 1921 although receiving this benefit under the law carried with it utility consent to a future purchase of its property by the municipality which it served. 10 Burns Indiana Stat. Anno. (1933), Secs. 54-605 and 54-606.

These then were the circumstances which gave birth to Citizens Gas, and to the courts these circumstances spelled out a public charitable trust. As this Court expressed it, Citizens Gas "was a quasi public corporation"; the "legal title to the property which was acquired with the money contributed by the certificate holders was in the Citizens' Company, subject to the trust in favor of the inhabitants of the City * * * *. The conveyance to the City to be made when the charge in

1. The basic provisions of the franchise contract and the articles of incorporation in this regard are the following:

Franchise Contract, Sec. 1 *(g)*. If the certificate holders receive x amount (*i. e.*, their investment plus a 10% return thereon) prior to the expiration of the franchise period, the plant property shall be conveyed to the City and the "corporation shall be wound up."

Franchise Contract, Sec. 1 *(i)*. If x amount not paid up and upon 6 months' notice by the City prior to the expiration of the franchise period, the plant shall be mortgaged in the sum of x amount, x amount paid up and the property transferred to the City "subject to such obligations and other legal obligations against said company."

Franchise Contract, Sec. 22. If x amount not paid up and the period expires, then the plant shall be conveyed upon the City paying up the balance of x amount or, at the option of the City the plant shall be mortgaged in the sum of x amount, the certificate holders paid up, and the plant property then conveyed to the City "subject to such obligations and other legal obligations against said company."

Articles of Incorporation. Sections 10 and 12 are substantially similar to Secs. 1(g) and 1(i) of the Franchise Contract. Sections 10 and 12, as amended, are also substantially similar to Secs. 1(g) and 1(i) of the Franchise Contract, except that Section 12 (as amended) provides for conveyance "subject to such mortgage and other legal obligations against said company."

favor of certificate holders was released was a continuance of the trust; the city being the successor in the fiduciary relationship." *Todd* v. *Citizens Gas*, 46 F. (2) 855, 865-866. Yet, even granting the "existence of a trust relationship between the Citizens Gas Company and a class of persons [inhabitants of the City] * * * * *, that relationship cannot qualify the power of control of the State over the Citizens Gas Company as a public utility." *Williams* v. *Citizens Gas*, 206 Ind. 448, 457.

And thus it came to pass that Citizens Gas and Indianapolis Gas became and were competing utilities in the city of Indianapolis. This competitive condition existed until 1913 when negotiations between the two rivals were begun which culminated in the execution of the 99 years lease in question. It is to be noted that in 1913 Indianapolis Gas had 375 miles of mains and was completing a modern coke oven and plant, and Citizens Gas had 184 miles of mains. The capital stock of the former was $2,000,000 and bonds in the amount of $4,835,000 were outstanding, while that of the latter was $1,250,000 and $1,247,000 respectively. In addition reports issued by Citizens Gas to its stockholders during this period indicated that it considered the existing competition between the two rivals dangerous to the company and to the community and that a merger would make possible certain important economies.

At any rate in March of 1913 the Indiana legislature passed the Shively-Spencer Act which created the Public Service Commission and conferred upon it certain broad powers of control and regulation over public utilities. 3 Burns R. S. 1926, p. 1238. Among other things the Act provided that when two public utilities are engaged in the same business in the same locality, one may lease or sell its property to the other if the transaction meets with approval by the Commission. Shortly thereafter the two utilities in question jointly petitioned the Public Service Commission for permission to execute the 99 years lease here involved.

The power to execute this 99 years lease was authorized by the Commission in October of 1913. According to the lease as finally approved and executed, Indianapolis Gas leased its gas plant property to Citizens Gas for a term of 99 years. In return the lessee agreed to pay a 6% return on the capital stock of Indianapolis Gas (par value

$2,000,000), interest on the mortgage bonds of Indianapolis Gas ($6,881,000 now outstanding), and taxes on the leased property plus certain additional miscellaneous expenditures. During the administrative proceedings one Frank S. Fishback intervened and objected to the execution of the lease. The City was represented by counsel but it did not object to the execution of the lease or to the order of the Commission. The objections were overruled, an order approving the lease entered, and Fishback's petition for rehearing denied.

Fishback intervened as an inhabitant of the city of Indianapolis and as certificate holder of Citizens Gas, and objected in essence that the lease was invalid. Among other things he stated the following: Citizens Gas had no power to execute the lease because (a) the duration of the lease exceeded the corporate life of the lessee and (b) the city of Indianapolis was the real owner of the lessee's property. In his petition for rehearing he stated the following: (1) Compliance with the terms of the lease would make it impossible for Citizens Gas to perform its contract with the City relating to the taking over of the property of Citizens Gas and (2) the City had not given its consent to the lease. The Commission overruled these grounds of objection and approved the lease.

Then Fishback instituted suit in the state court to set aside the order of the Commission, and joined as parties defendant the Commission, Citizens Gas, Indianapolis Gas, and the City. In the main the complaint alleged the grounds urged at the administrative proceedings. The City's answer denied these alleged grounds, and the other defendants demurred thereto. On the day of judgment and prior to entry thereof Fishback dismissed as to the City. A judgment was rendered sustaining the demurrers and an appeal was taken therefrom. Later the appeal was dismissed for failure to perfect it in time. *Fishback* v. *Public Service Commission et al.*, 193 Ind. 282.

Thus it happened that in 1913 the competition between Indianapolis Gas and Citizens Gas came to an end. Citizens Gas acquired the plant property of the other and from 1913 to September 9, 1935 operated the leased property with its own as part of a consolidated system. During this period Citizens Gas controlled the entire gas

business of the city of Indianapolis and after 1921 it operated the two properties in question under an indeterminate permit of the Public Service Commission. In all Citizens Gas made payments under the lease that amounted to $11,668,984.77. It also expended around $2,000,000 for capital improvements on the leased property, but for this it was reimbursed by the issuance of Indianapolis Gas bonds which Citizens Gas then sold to the public through a firm of investment bankers.[2]

On March 11, 1929 the Indiana legislature passed legislation which authorized cities to "take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of acquisition of any utility by any such city." Chapter 77, Laws of 1929, Ind., pp. 252, 257, 259-260. This legislation also provided that the transferee city "shall be authorized to accept, hold and own all the property of such corporation so transferred to it * * * and any right, title or interest such transferring corporation [the utility] may have in any lease upon other property." Chapter 78, Laws of 1929, Ind., pp. 268-271. This legislation becomes pertinent in view of certain pleadings in a federal case filed April 30, 1929. *Todd* v. *Citizens Gas et al.*, 46 F. (2) 855. Therein the city of Indianapolis admitted in its answer to the complaint that the legislation above was introduced and passed at the request of the City and that the particular legislation was prepared by special counsel of the City "employed for the purpose of bringing about a

2. In marketing the Indianapolis Gas bonds the firm of investment bankers used circulars representing that Citizens Gas had a 99 years lease on the property of Indianapolis Gas and that Citizens Gas had guaranteed the payment of the interest on these bonds.

The record shows that copies of these circulars were first sent to the Secretary and General Manager of Citizens Gas for approval and correction. The record also shows that the firm knew the factual history leading up to the organization of Citizens Gas and knew also of Section 32 of the 99 years lease which provided that "In event it should be determined by a court * * * that the contract is *ultra vires* or void because of the length of term created * * * then this lease shall nevertheless be binding * * * for the longest term for which the parties hereto might lawfully contract."

The record also shows that in various reports to its stockholders Citizens Gas, through its Secretary and General Manager, made reference to the 99 years lease and to the guarantee of the interest on the Indianapolis Gas bonds.

transfer of the plant and property" of Citizens Gas to the City.[3]

Nine days later on March 20, 1929 the City gave Citizens Gas notice that it was exercising its right to take over the trust property as successor trustee of the public charitable trust. Thus in the resolution of March 20 the City resolved that it would take over "all rights, title, interests and ownership, of whatever nature or character * * * * transferred or vested in and to said City in * * * the gas plant, mains and property of said Citizens Gas Company by virtue of" (1) the franchise contract of August 25, 1905, (2) the articles of incorporation of Citizens Gas, (3) the conditions stated in the certificates of the owners of the stock, and (4) all "Statutes of this state and other laws relating to the subject matter hereof."

By this same resolution the City directed Citizens Gas to mortgage the property in a sum sufficient to discharge the certificate holders and then demanded Citizens Gas to convey "the plant, property and assets" subject to "such mortgage and other legal obligations against said company." This resolution was served upon Citizens Gas and on April 3, 1929 that company recognized "the trust created by the franchise * * * and by the Articles of Association," acknowledged the right of the city of Indianapolis to take over the property and assets, and directed its officers to comply with the resolution.

However, on April 30, 1929 one Newton Todd (certificate holder of Citizens Gas) commenced a suit in the Indiana federal court to enjoin Citizens Gas from con-

3. The admission in the *Todd* case also revealed that the legislation in question was passed in the "exact form prepared and submitted by said counsel." It appears too that the admission goes only to Chapter 78, but it is obvious that Chapters 77 and 78 go hand in glove. Chapter 77 was made available to cities having a population of not less than 300,000 and Chapter 78 referred only to transferor utility corporations organized prior to 1913.

In fact this legislation expressly authorized the transfer of utility property (held in fee or by virtue of a lease) under circumstances peculiarly similar to the factual situation existing between Citizens Gas, Indianapolis Gas and the City in the instant case. If the legislators had had in mind the exact factual situation here involved, they could not have passed more appropriate legalizing and enabling legislation.

The legislation also provided that the question of acquiring such utility property held by virtue of a lease need not be submitted to a vote of the city electors nor be subjected to the Public Service Commission for approval.

veying its property to the City in the mode proposed in the resolution of March 20. Shortly thereafter a similar action was brought by one Cotter and the cases were tried together. Todd and Cotter claimed that a city purchasing the property of a public utility must comply with the Shively-Spencer Public Utility Act of 1913, that is, it must pay the present day value of the property as determined by the Public Service Commission and obtain the approval of the Commission and city electors.[4] The complaints in the two cases were dismissed for lack of equity, and on appeal the decrees were affirmed. *Todd* v. *Citizens Gas*, 46 F. (2) 855; cert. den., 283 U. S. 852. The Court stated on page 866 that the conveyance in the instant case was not a purchase by the City and that "When they [certificate holders] are paid off, as provided [in the articles of incorporation], their interest [in the gas plant] is at an end."

In leaving the *Todd* and *Cotter* cases another admission in the pleadings is to be noted. In the *Cotter* case the City (a party defendant) admitted the following things in its answer to the complaint: (1) "after the passage of the Shively-Spencer Act of 1913 the Citizens Gas, pursuant to an order of the Public Service Commission of Indiana and with the full consent and approval of the city of Indianapolis, * * * leased from the Indianapolis Gas Company all of its plants and property for a period of ninety-nine years"; and (2) "since 1913 the Citizens Gas Company with full knowledge and consent of the City has operated the combined properties." This then brings us to the *Williams* case which was filed in 1930 while the *Todd* and *Cotter* cases were still pending. See *Williams* v. *Citizens Gas et al.*, 206 Ind. 448.

4. Todd and Cotter also urged the following things: (1) the surrender of the franchise in 1921 ended all rights and obligations and thereby relieved the directors and trustees of Citizens Gas from complying with the articles of incorporation (charter) requiring the conveyance to the City; (2) the legalizing legislation of 1929 was contrary to due process of law. The Court disposed of the contentions in the following way: (1) the franchise contract of 1905 was not a contract for a purchase, but an "agreement by which the City obtained an interest in the plant subject to the charge in favor of the certificate holders"; (2) the surrender of the franchise in 1921 did not relieve the directors and trustees from the duty to convey to the City, a duty inscribed in the charter, for the provisions of the charter "were not a part of the * * * franchise * * * and were not affected by the surrender."

The Court, however, did not pass on the validity of the legalizing legislation of 1929. Nor did the Court discuss whether the leasehold was part of the trust *res* or whether the particular transfer sought to be enjoined included the property held under the lease.

Williams, an inhabitant and taxpayer of the City, sued as a beneficiary of the public charitable trust (created by the franchise contract of 1905, the articles of incorporation, and the various circumstances already related) and the parties defendant were Citizens Gas, Indianapolis Gas, the City and others. The complaint was based on the theory that the trust was adversely affected and slowly being destroyed by complying with the lease in question which Williams alleged was invalid. He alleged that the lease in question was the product of a conspiracy by the officials of Citizens Gas and Indianapolis Gas and by others, and that some of the overt acts of the conspiracy were the following: (1) the procurement of the enactment of the Shively-Spencer Utility Commission Act; (2) the approval of the lease by the Commission; and (3) the surrender by Citizens Gas of its franchise and acceptance of an indeterminate permit.

Demurrers filed to the *Williams* complaint were sustained and the judgment of dismissal rendered thereon was affirmed on appeal.[5] *Williams* v. *Citizens Gas et al., supra.* As stated by the Indiana Supreme Court, "it appears from the complaint that the lease was one which the Citizens Gas Company and Indianapolis Gas Company had the power to execute." In passing on, one more thing pertaining to this case may be noted. In the trial court the City (one of the parties defendant) moved to strike out certain parts of the complaint and stated the following in support of its motion: (1) "Inasmuch as said lease was duly approved by the Public Service Commission," its order could not be collaterally attacked; (2) "The lease * * * having been validly made, the actions of any individuals leading up to such lease are wholly immaterial"; and (3) "The validity of the public charitable trust set up in the complaint is in no wise affected by the validity of such lease. If the lease is valid the leasehold interest created thereby constitutes a part of the

5. The complaint in the Williams case relates in detail the history of Citizens Gas and Indianapolis Gas and seeks to show that the 1913 lease was the product of a conspiracy. In affirming the judgment of dismissal the Indiana Supreme Court disposes of four pertinent points in the following way: (1) the Shively-Spencer Act of 1913 is constitutional; (2) Citizens Gas and Indianapolis Gas had the power to execute the lease in question; (3) the action of the Public Service Commission in approving the lease is valid; and (4) the action of Citizens Gas in surrendering its franchise and in accepting the indeterminate permit is valid.

public charitable trust * * *. If * * * the lease is invalid, it would fall without the scope of the trust."

After the resolution of March 20, 1929 came the *Todd, Cotter* and *Williams* cases and for five years the history just related was dragged through the courts. The litigation over, negotiations pertaining to the transfer of the utility property were again resumed. Then on May 7, 1935 the City authorized the issuance of Gas Plant Revenue Bonds in the amount of $8,000,000. See Laws of 1935, Ind., Chap. 311. The bonds were issued to provide funds for the taking over of the utility property "owned by Citizens Gas of Indianapolis and/or in which it has an interest." The bonds themselves recited that the payment of principal and interest was "secured by a charge upon all the revenue from the operation of all of the gas system owned and/or operated by the City of Indianapolis."

After the Revenue Bonds were issued, the City offered them for sale to security brokers and there was made available to bidders a prospectus which described the utility property and its history. This prospectus informed bidders that a public charitable trust existed in the "property of Citizens Gas" and that the City was preparing to acquire and to operate this "utility property in which the City has an interest." It described the gas "system operated by Citizens Gas" as "in part owned by Citizens Gas Company and in part * * * leased by it" for a term of 99 years. The prospectus was worded carefully: although the leased property was included expressly as part of the "system operated by Citizens Gas," it was not included expressly as part of the trust or "utility property in which the City has an interest." The unescapable impression, however, from reading the context of the prospectus is that the leased property was treated as being a part of the utility property subject to the trust.

On July 23, 1935 counsel for the City advised Indianapolis Gas by letter that the City would take over "the property which has been operated by Citizens Gas" but that in acquiring this property it did not become liable for the lease obligations of Citizens Gas under the legalizing legislation of 1929 (already discussed). Counsel also suggested in this letter that "the City * * * is willing to enter into negotiations * * * looking toward a revision

of this lease to meet the new conditions that will result from municipal operation." By August 27, 1935 counsel for Citizens Gas was also advised that "the City was going to attempt to reject the lease."

On September 9, 1935 Citizens Gas conveyed the entire gas plant operated by it to the City. In return the City had applied around $6,300,000 (part of the proceeds from the sale of the Revenue Bonds) to the retirement of the claims of the certificate holders and bondholders of Citizens Gas, in accordance with the franchise contract and articles of incorporation. In other words, the entire consideration for the transfer was paid to the certificate holders and bondholders of Citizens Gas, and thereafter that corporation had no property and engaged in no business activity. The City did execute an indemnity contract running in the favor of Citizens Gas, however, in which the City agreed to save the corporation harmless from any loss or liability occasioned by the transfer or any action thereafter brought against it.

Thus, on September 9, 1935 Citizens Gas executed and delivered four instruments to the City, which conveyed the entire utility property subject to the legal obligations of the transferring corporation: (1) a deed conveying the real estate; (2) an instrument transferring the personal property; (3) an assignment of a lease covering space in a certain building; and (4) an assignment of the 99 years lease in question. These instruments were received, retained and duly recorded by the City. On the same day the City passed two resolutions: one rejecting the lease and refusing to assume the lease obligations; the other accepting the property held under the lease temporarily and solely to prevent interruption of service.

And on September 9, 1935 the City acquired the utility property of Citizens Gas and assumed operation of the entire gas system including the leased property. On September 30, 1935 Indianapolis Gas notified the City that while it relied on the validity of the lease, it would enter into a stipulation (in the interest of a continued public service) under which the City might continue operation of the plant under the terms of the lease without prejudice to the legal rights of either party.

Nature of the Trust. These then are the facts in the instant case and summarizing they spell out the follow-

ing situation. In the history of the city of Indianapolis certain events and circumstances occurred. These things combined and the result was the creation of a charitable trust for an indefinite and unlimited period of time. *Todd* v. *Citizens Gas et al.*, 46 F. (2) 855, 866. The settlors of this trust were specific citizens of the City who subscribed for the capital stock of Citizens Gas, and the *cestuis* were the gas users of the City. The trust provided for two trustees: (1) the initial trustee, Citizens Gas, a corporate trustee; and (2) the successor trustee, the City, a municipal corporate trustee.

The terms of the trust (the franchise contract and the articles of incorporation) referred generally to the duties of the trustee and the rights of the beneficiaries. Thus the trust provided for a corporate trustee (Citizens Gas) with powers to operate a utility plant for the purpose of supplying the City with light, heat and power. This corporate trustee was to administer the trust until such time as the City exercised its right to succeed to the trusteeship and accepted the trust *res*. The City was required to exercise its right to succeed as trustee by August 25, 1930.[6]

Soon Citizens Gas was organized with powers to supply the City with light, heat and power and in accordance with the terms of the trust this corporate trustee proceeded to engage in the utility business. In 1907 it purchased the gas plant property of the old Consumers Gas Trust Company. In 1913 it purchased the leasehold interest in question, that is, it leased the gas plant property of its rival for a term of 99 years. Then it operated the two properties as a unit and controlled the entire gas busi-

6. According to the franchise contract and articles of incorporation, the City was to declare its intention to take over the trust *res* at the end of the franchise period (25 years) or sooner, whenever the claims of the certificate holders were satisfied. See footnote 1. Also *Todd* case, *supra*, at p. 866: "The conveyance to the city to be made when the charge in favor of certificate holders was released was a continuance of the trust; the city being the successor in the fiduciary relationship."

In the event that this charge in favor of the certificate holders was not released or that the City failed to accept the trust *res*, Citizens Gas was to continue operating the plant as trustee. In this regard it is significant to remember that Citizens Gas held an indeterminate permit to operate within the City, subject to the right of the City to succeed to the trusteeship as related above and subject to the right of the City to purchase the plant under Indiana law. *Todd* case, *supra*.

It is to be noted too that Citizens Gas had a corporate life of 50 years. This is really immaterial: it is conceivable that at the end of such time corporate rebirth would be in order; at any rate a charitable trust will not ordinarily fail for want of a trustee.

ness of the City. In 1929 the City declared its intention to succeed to the trusteeship. Further action was delayed pending the settlement of interfering litigation. Finally in 1935 the City accepted the property held in fee but rejected the leasehold interest.

What has just been said, reveals the real nature of this public charitable trust. The trust runs for an indefinite and unlimited period of time. Its corporate trustee is given the duty to operate a gas plant under an indeterminable permit, and is instructed to administer the trust for an unlimited period of time subject to the City's power to succeed as trustee. This power to succeed must be exercised by the City within a certain time (25 years) and upon a certain condition (satisfaction of particular claims). Thus this initial trusteeship may be short-lived or it may be coextensive with the life of the corporate trustee.

Nature of the Lease. We have related the factual history of the utility business in the city of Indianapolis and have shown that many courts and many parties have concerned themselves therein over one phase or another. And until this litigation was started it appears that every one proceeded on the basis that the lease contract covered a term of 99 years. In this case the argument is advanced that the lease contract is not a 99 years lease at all but that it is one for 99 years or for such shorter time as Citizens Gas might remain as trustee. We are not convinced by the argument made in this regard.

In making this point counsel for the City and for Citizens Gas emphasize Sections 13 and 32 of the lease contract. Section 13 states that certain agreements of the lease (*i. e.*, to secure new franchises and to extend the corporate life of the lessee) are "subject to the rights now held by the city of Indianapolis under the terms of the franchise." Section 32 (see footnote 2) provides against judicial disapproval of the lease contract because of the length of the term involved. As expressed by counsel for the City, "those who drew the lease intended that Citizens Gas should be bound only for the period of its trusteeship, and that they never intended that the City as successor trustee should be bound."

This construction of the contract lease—that the lease is one for 99 years or for such shorter time as Citizens

Gas might remain as trustee—reduces itself to the absurd in light of the real nature of the trust. Our analysis of the trust indicates that the initial trusteeship might well have terminated in 1914 as at any later time. Under such circumstances it becomes inconceivable that "those who drew the lease" intended that the lease ever be for such shorter time. Moreover the granting clause of the lease contract expressly fixes the term at 99 years. To accept counsel's construction in the face of this, is to ignore the plain statement of the granting clause and to change unduly the contractual obligation. We conclude that the lease contract is a 99 years lease.

Nor are Sections 13 and 32 inconsistent with our conclusion. Section 13 treats certain promises of the lessee, *e. g.*, the promise to extend its corporate life, as being subject to the City's "rights." Obvious it is that if the City chooses to succeed as trustee of the trust *res* or to take over the plant property subject to the "legal obligations" of Citizens Gas (footnote 1), then it is unnecessary to fulfill the certain promises mentioned. In this regard Section 13 does not compel the construction urged that the contractual obligation ends with the initial trusteeship. Moreover it is confined to the promises therein described and wholly fails to refer to the 99 years obligation. At the most Section 13 presents the question whether this obligation is a "legal obligation" (one which Citizens Gas had power to incur), and whether the City takes over the plant property subject to it.

On the other hand Section 32 anticipates a possible judicial determination as to whether a corporation having a life of 50 years has the power to incur an obligation running for 99 years. Surely this Section does not require the construction urged by counsel that the contractual obligation ends with the initial trusteeship. At the most Section 32 merely anticipates the question possibly presented by Section 13 and soon to be answered, namely, whether the corporate trustee in the instant case had the power to incur the 99 years obligation. In passing we repeat that our consideration of Sections 13 and 32 leaves undisturbed our conclusion that the real nature of the contract in question discloses a lease for a term of 99 years.

Trust Res. What is the trust rest of this particular charitable trust? The answer to this question will dis-

pose of most of the contentions urged by counsel in this appeal. In fact a consideration of the briefs and the various arguments made therein indicate plainly that counsel disagree seriously in this regard. In essence counsel for Chase and Indianapolis Gas argue in the following vein: the lease is valid and therefore a part of the trust *res;* it follows that the City may not accept a part of the trust *res* and refuse to accept another part.

On the other hand counsel for the City states his argument thus: the "City has not, as is asserted, accepted a part of the trust *res* and refused to accept another part. It has accepted the entire trust *res* and rejected a lease which the initial trustee had no power to make (p. 38) * * * The trust *res* was the property and plant of Citizens Gas, and this consisted of the property formerly owned by the Consumers Gas Trust Company (p. 56)."

Moreover counsel for Citizens Gas expresses his argument as follows: "Citizens Gas has never denied its power and authority to bind itself as trustee and the trust property for the term of its trusteeship (p. 14) * * * and this lease would have been binding upon Citizens Gas for the full term of 99 years if it had been permitted to act as a public utility for that length of time (p. 15) * * * the Lease was a binding contract between the parties throughout the term of its trusteeship (p. 23)." In this regard the City in its pleadings conceded "for the purpose of this litigation" that the lease in question, if valid at all, was valid during the trusteeship of Citizens Gas.

That a valid leasehold interest may constitute the subject-matter of a trust is not open to dispute, nor do counsel in this case contend differently. If the lease is valid, the rental obligation binds the trust and it matters little that a new trustee succeeds the old one. Otherwise any obligation incurred by a particular trustee would cease with the death, resignation or removal of that trustee: such a rule would lead inevitably to ridiculous results. Therefore, if the lease in question is valid, two conclusions follow: (1) the subject-matter of the lease contract is an asset and becomes part of the trust *res;* (2) the lease obligation binds the trust and is not discharged by a mere substitution of trustees. Earlier in our opinion we have discussed the real nature of the trust and the City's part in the scheme of things; the City is a successor trustee and as such must

accept or disclaim the entire *res*. We have also discussed the real nature of the lease and its part in the scheme of things: the lease is one for 99 years and if valid the leasehold interest is part of the trust *res*. We have just related the arguments of counsel which indicate agreement in one regard and disagreement in another. Counsel agree that if the lease is valid, the leasehold interest is part of the trust *res*. Counsel disagree on the question whether the lease is valid and this we now answer.

Our problem relates to the administration of the trust and particularly concerns itself with the extent of the corporate trustee's powers. Did the trustee have the power to make this lease, *i. e.*, to acquire this leasehold interest and to incur the rental obligation? The rule is that a trustee can properly exercise such powers as are conferred upon him in specific words by the terms of the trust or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust. We must apply that rule here.

The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remain silent on the subject of trustee's powers. The only applicable language relates to duties and not to powers. This language imposes upon the trustee the duty "to supply the City of Indianapolis and its inhabitants with light, heat and power." Plainly the extent of the trustee's powers are measured by the scope of the duty imposed in the terms of the trust, and it is reasonable to conclude that the trustee had the power to secure what utility property was necessary or appropriate to enable it to engage in the gas business and to supply the City with light, heat and power.

Counsel for the City argues but not impressively that the trustee lacked the power to lease the property of its rival because such action might contravene public policy. In this connection it is a fact that Citizens Gas leased and operated the Indianapolis Gas property for the period of the initial trusteeship. The actual point urged by counsel for the City is that (1) the trustee lacked the power to lease property from anyone for a term of 99 years and that (2) if the trustee had power to lease, it only had power to lease for a term of years not exceeding the initial trusteeship. On

this point counsel for Citizens Gas admits that the trustee had power to lease for a term of years not exceeding the initial trusteeship.

Yet we know that the trustee had the power to acquire adequate gas plant equipment. And it is admitted that the freehold estate in the property purchased in 1907 became part of the trust *res*: the trustee had the power to purchase in fee simple and consequently the freehold estate became trust property. From what has just been said, certain conclusions follow as a matter of logic: (1) the trustee had the power to purchase the Indianapolis Gas property in 1907 or in 1913; and (2) the trustee had the power to lease this property in 1907 and 1913 for a term of years not exceeding the initial trusteeship. In situation (1) the property would have become a permanent part of the trust *res*. In situation (2) the property would have become a temporary part of the trust *res*.

Thus counsel's argument that the trustee lacked the power to make this particular lease narrows to an attack on the *mode* of the acquisition of the property. In view of the circumstances counsel can not argue, nor does he argue, that the trustee lacked the power to acquire the property in question: manifestly the trustee had the power to acquire either a freehold or a nonfreehold interest in the property. His argument condemns the acquisition in 1913 because of the duration of the term. In effect counsel states that the trustee had power to acquire property but no power to acquire it for a term of 99 years or for any term of years exceeding any particular trusteeship.

Counsel relies considerably on the leading case of *In re Hubbell Trust*, 113 N. W. (Iowa) 512 as expressing judicial disapproval of long-term leases. In that case the *private* trust had a probable duration of 71 years and the trustee (an individual) leased the trust property to others for a term of 99 years. The court disapproved of the long-term lease because the duration of the lease exceeded the period of the trust and hence incumbered the rights of the remainderman. The court laid down several rules for the guidance of trustees (page 522): "(1) The trustees may lease for such reasonable terms as are customary * * *; (2) Such terms should not, save on showing of reasonable necessity * * *, extend beyond the period the trust is likely to continue; (3) Should they extend unreasonably beyond such period, the excess only will be void * * *."

We believe that the *Hubbell Trust* case is a well-reasoned one but it does not support counsel's argument that the trustee did not have the power exercised in 1913. The *Hubbell Trust* case does not stand for the proposition that a trustee has no power to lease for a term of years. At the most it stands for the rule that a trustee has no power to lease trust property for a term of years exceeding the period of the trust. It does not take much comparison to see that such a rule does not support the proposition here urged, namely, that the trustee lacked the power to lease beyond its period of trusteeship.

Moreover in the instant case the trustee's power to acquire a long-term leasehold interest is in issue, not the trustee's power to lease trust property for a long term of years. Yet even if applicable, and we believe the *Hubbell Trust* case is analogous, the trustee in our case did not lease for a term of years exceeding the period of the trust. In fact the court in the *Hubbell Trust* case recognized that charitable trusts were to be treated differently than private trusts in this regard, for it said on page 522 that "the decisions with reference to charitable trusts afford no aid, for the trust period in these is indeterminable, and the length of the lease is considered only as bearing upon the reasonableness of its provisions and of the rentals stipulated. Such leases have been approved where otherwise reasonable with terms varying from 80 to 1000 years. See * * * *City of Richmond* v. *Davis*, 103 Ind. 449 * * * [other cases cited]."

Thus counsel's argument that the trustee lacks the power to lease this property because the duration of the lease exceeded the trusteeship (or even the trustee's life), has no real foundation in the law. Obviously the principle of law that a trustee has no power to lease where the term of years exceeds the period of the trust, has no application here. In the end our case is this: under the terms of the lease the trustee had the power to acquire certain property; the power of acquisition might well have assumed at least two forms—acquisition by outright purchase or by long-term lease; the trustee selected the latter mode of acquisition. Selecting one mode of acquisition rather than the other does not alter the situation: the trustee had the power to acquire.

However, another point arises where as here the trus-

tee has the power to make leases. In making a long term lease a trustee is under a duty to act with prudence. If a trustee makes a lease which is unreasonable under the circumstances, he thereby commits a breach of trust. For this a trustee incurs liability to the beneficiaries who in addition may have such a lease set aside. This record discloses that the trustee was justified in selecting the mode of acquisition which it did. When the prudence point was urged before the Indiana Supreme Court, that court did not find the lease in question unreasonable as to time or as to its other terms. *Williams* v. *Citizens Gas, et al.*, 206 Ind. 448, 458, 460.

We therefore conclude that the trustee had the power to make the long-term lease in question and that this particular leasehold interest in the Indianapolis Gas property is part of the trust *res*. In passing it might be said that the few cases discussed in the opinion above are determinative of the immediate issue here, *i. e.*, as to the validity of the 99 years lease. See in particular *Fishback* v. *Public Service Commission, et al.*, 193 Ind. 282; *Williams* v. *Citizens Gas, et al.*, 206 Ind. 448; *Todd* v. *Citizens Gas, et al.*, 46 F. (2) 855; *Chase Nat. Bank* v. *Citizens Gas, et al.*, 96 F. (2) 363, 365. No amount of verbal magic resorted to by counsel for the City will avail to brush aside the barrier these cases present to him. Nor have we overlooked the various admissions and apparent inconsistencies of the City during the history of this gas utility controversy in the courts and before the administrative bodies, but these points we find unnecessary to the decision herein reached.

Successor Trustee. In this case the City declared its intention to succeed as trustee and to accept the trust. Then it proceeded to accept the property held in fee and to disclaim the property held under the lease. We have shown that the predecessor trustee had the power to acquire the properties in question and that upon acquisition these properties became the subject-matter of the trust. The facts show that the gas plant is operated as a unit and that the continued operation of both properties is necessary in order to prevent disruption of service to gas consumers.

Thus we have a case where the successor trustee accepts the office of trustee but purports to accept the trust only as to a part of the trust property or only as to some of the duties. This cannot be done. We have shown that

the trust *res* consists of the two properties described. This is not a case of two separate and distinct trusts, one as to a freehold interest in property, the other as to a nonfreehold interest in property. We conclude that acceptance of the office of successor trustee and of part of the trust, operates as an acceptance of the whole trust. The City takes the trust property subject to the lease obligation incurred by Citizens Gas.

Form of Relief. Counsel for Indianapolis Gas contends that the instant suit was one asking for a declaration of rights and that hence the District Court erred in granting both declaratory and coercive relief. The original bill of complaint alleged facts relating to the history of this utility controversy, describing the escrow arrangement between the City and Indianapolis Gas in 1936 whereby a sum equal to the rentals under the lease would be deposited with an escrowee, and indicating the probable effect of these events on Chase's rights to the payment of bond principal and interest coupons. The prayer sought a declaratory judgment concerning the validity of the lease and a "judgment • • • in the amount of all unpaid interest payable under said lease." At the time of this complaint no interest coupons were yet due. Later a supplementary bill was filed, which set up subsequently occurring facts showing default as to interest coupons and which prayed a coercive judgment in the amount of the unpaid coupons.

These pleadings reveal that the pleader joined claims for a declaration of rights and claims for personal coercive relief, and that the pleader requested a declaration as to the validity of the lease and a coercive form of relief as to the unpaid coupons and interest thereon. The lease and coupon claims arose out of the same factual background and represented the aftermath of the instant utility controversy. The supplemental pleading merely presented subsequent matter already related to the claims as presented in the original pleading. See *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 203; Rule 15 (d), Federal Rules of Civil Procedure. Nor does counsel urge that the handling together of these claims interfered with trial convenience.

The District Court did not err in treating the complaint as above stated and in deciding the issues thus presented. Such a procedure is proper under the Federal Declaratory

Judgments Act and the Federal Rules of Civil Procedure. 28 U. S. C. Sec. 400; Federal Rules 18, 54, 57; see also, Borchard, Declaratory Judgments (1934), pp. 175-176. Counsel relies on *Brindley* v. *Meara*, 209 Ind. 144, where the Indiana Supreme Court interpreted the Indiana Declaratory Judgments Act. This decision can not bind us in our interpretation of the Federal Declaratory Judgments Act, even if it could be said to be inconsistent with the position we take here.

It is not improper for a pleader under the Federal Rules of Civil Procedure to combine in one complaint a request for a declaration and for some coercive relief. Nor is it improper for the District Court to render a judgment or judgments granting both forms of relief. Our conclusion in this regard is not at variance with anything said by the United States Supreme Court in the following cases, as counsel would have us believe. *Nashville, C. & S. Ry.* v. *Wallace*, 288 U. S. 249; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Perkins* v. *Elg*, 307 U. S. 325, 349.

Chase's Authority to Sue. In this case Indianapolis Gas issued bonds payable to bearer. To secure the payment of principal and interest thereon, Indianapolis Gas mortgaged its property to certain trustees in behalf of the many bond purchasers. Chase is now the sole Trustee and is here suing for the benefit of the bondholders. Chase's authority to bring this suit is derived from the mortgage deed of trust (or Indenture of Mortgage) executed by Indianapolis Gas and the certain trustees. Our immediate task is to measure the extent of Chase's powers to sue in behalf of the bondholders.

Each bond provided for the payment of $1000 principal in a certain future year and the payment of 5% interest per annum. Payment of the interest was to be made at the office of the trustee of the mortgage deed of trust upon the presentation and surrender of the interest coupons. Each bond also provided for an acceleration clause in case of interest default, subject to the conditions of the mortgage deed of trust. In addition each bond provided that it had been issued by Indianapolis Gas "under and in accordance with the terms and conditions" of the mortgage deed of trust (Indenture of Mortgage).

Among other things the mortgage deed of trust provided in Section IX that Indianapolis Gas "agrees to and with" the Trustee to "pay the principal and interest of and upon

the bonds * * * as the same shall become due and payable" and that upon any "default in the due performance of this covenant" due presentment and demand for payment of the "bonds and coupons" is waived. Section XIV then provided that the "right of action under this indenture is vested exclusively in the Trustees, and under no circumstances shall any bondholder or bondholders have any right to institute an action * * * for the purpose of enforcing any right herein and hereby provided, or of foreclosing this mortgage, * * * and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the Trustees according to their sound discretion."

An intelligent reading of the mortgage deed of trust, properly incorporated by reference in each bond sold, is sufficient to dispose of counsel's argument that Chase is without authority to sue for the unpaid interest coupons. The two sections stated above expressly give Chase as Trustee the power to recover judgment for either principal or interest in default. Of course the Trustee holds the judgment or its money equivalent for the benefit of the bondholders. That a trustee has the right to enforce the provisions of a mortgage where as here the mortgagor has made an express promise to the trustee that it will pay the principal and interest, is recognized. See *Carey* v. *Brown*, 92 U. S. 171, 172; *New York Trust Co.* v. *Michigan Traction Co.*, 193 F. 175, 180; *First Nat. Bank and Trust Co.* v. *Dolph*, 283 N. W. (Mich.) 35, 38.

We conclude therefore that Chase was authorized to sue for the default in the payment of interest coupons and that the judgment in its favor as Trustee for the benefit of the bondholders was proper. Counsel also objects to the judgment on the following grounds: (1) the original interest coupons (best evidence) were not produced or read in evidence; (2) the judgment failed to provide that the Trustee pay over recovered sums to bondholders only upon the surrender and cancellation of the coupons; and (3) the maker of the bonds owned part of them. Assuming the truth of these objections would not compel reversal, for the objections are not substantial in character.

As for objection (1), a copy of the mortgage (the mortgage deed of trust) was attached to the complaint and this included the form of each bond and coupon held by bondholders. Furthermore the parties by express stipula-

tion waived any necessity for producing the original of each bond or coupon in evidence. As for objection (2), the bond itself provides that coupons are payable only upon presentation and surrender of the coupons. As for objecton (3), the basis thereof was stipulated to be so by the parties, yet counsel waited to urge the objection at this time. These objections, urged for the first time, are technical at the most and merit no further consideration.

Right to Interest on Interest. Our case is one where the bonds in question incorporate by reference the provisions of the mortgage deed of trust. Our case is also one where the Trustee for the bondholders was authorized to sue on the bonds in order to enforce (1) the covenant to pay the interest coupons or (2) the covenant to pay the principal. Had the Trustee elected to enforce covenant (2), it would have had the concomitant power under Section III of the mortgage deed of trust to foreclose the mortgaged property (the security) and to collect the proceeds from the sale thereof. The Trustee however elected to enforce covenant (1). See *New York Trust Co.* v. *Michigan Traction Co.*, 193 F. 175, 180.

Now the usual rule in these matters is to allow interest on the unpaid interest coupons after default. *City of Jeffersonville* v. *Patterson*, 26 Ind. 15, 16; *Gelpcke* v. *Dubuque*, 68 U. S. 175, 206. Yet the District Court denied this claim to interest on the interest coupons from the date of maturity to the date of the judgment. Necessarily the rule applies, unless the bonds themselves or the mortgage deed of trust incorporated by reference therein qualify this right to interest on interest. The District Court pointed to Section III of the mortgage deed of trust as limiting the right to interest on the unpaid interest coupons. That Section relates that after a foreclosure and sale by the Trustee for the bondholders, the proceeds shall be applied first "to the payment of interest on said bonds * * * but without interest upon such interest" and then to the payment of the principal on the bonds.

But in the instant case the Trustee did not elect to enforce covenant (2) above, that is, the Trustee for the bondholders is not seeking here to foreclose the mortgaged property and to collect the proceeds from the sale thereof. Instead the Trustee has elected to enforce covenant (1), that is, it seeks here to recover the unpaid interest coupons in default. Obviously the limitation contained in

Section III is not applicable. Nor should it be assumed that the right to interest upon enforcing covenant (1) can not be more extensive than the right to interest upon enforcing covenant (2). The covenants are independent. As to one there is a limitation. It does not follow at all that as to the other a similar limitation is implied. We conclude that the judgment should have included interest on the unpaid coupons from the date of maturity to the date of the judgment.

Rate of Interest. According to the case and statutory law of Indiana, if an obligation bears a specific rate of interest (the contract rate), then the obligation will continue to bear interest at the contract rate after maturity and the judgment thereon will bear interest at the same rate. On the other hand if there is no contract rate, the rate is the statutory 6%, both as to the obligation after maturity and as to the judgment thereon. See *Shaw* v. *Rigby*, 84 Ind. 375; *Kerr* v. *Haverstick*, 94 Ind. 178; *Gale* v. *Corey*, 112 Ind. 39; 5 Burns Indiana Statutes Annotated (1933), Secs. 19-2002 and 19-2003.

It is Chase's contention that in applying the Indiana law in this matter, these results follow: (1) as to the bonds, the contract rate is 5%, and therefore after maturity the bonds will bear interest at 5% and any judgment for the principal will also bear interest at 5%; (2) as to the amount due on the coupons, there is no contract rate specified but instead there is a direct promise to "pay to the bearer * * * Twenty-five dollars * * *" at a specified date, and therefore the rate of interest on the coupons after maturity is 6% and the rate of interest on the judgment for the overdue and unpaid coupons is also 6%.

We disagree with Chase when it contends that there is no rate of interest specified on the coupons. In describing the coupons above, Chase omits the following significant words: "being six months' interest on its First Consolidated Mortgage *Five Per Cent.* Gold Bond No. ....." Moreover the face of each bond reads as follows: "The Indianapolis Gas Company * * * promises to pay * * * [the principal] * * * with interest * * * at the rate of five percent. per annum * * *; that is to say, on the first day of April and of October * * * upon the presentation and surrender of the *annexed coupons* respectively." (The emphasis is our contribution.) We conclude that the unpaid interest coupons bear interest at 5% (the contract rate) from the date of maturity to the judgment and that

the judgment for the overdue and unpaid coupons also bears interest at 5% until the same is satisfied.

Liability of Citizens Gas. We have considered the complete argument made by counsel for Citizens Gas and conclude without further discussion that its liability under the lease continues but that its liability is secondary to the liability of the City as successor trustee and to the liability of the trust property. We have also concluded that the indemnity contract executed by the City and running in favor of Citizens Gas, is valid and effective. In passing it is to be noted that the lease obligation carries with it the payment as rental of the interest on the bonds of Indianapolis Gas.

Conclusions. Our conclusions in this case follow: (1) the 99 years lease is valid; (2) the assignment of the lease did not relieve Citizens Gas from its obligations as lessee; (3) the indemnity contract is effective; (4) the lease binds the City as successor trustee and the trust property; (5) the leasehold interest is part of the trust *res;* (6) the City has accepted the trust *res;* (7) Chase has a right to interest; (8) Chase has a right to interest on interest; and (9) Chase is entitled to interest at the rate of 5%.

Therefore the judgment of the District Court is reversed. Chase is entitled to a declaratory judgment to the effect that the lease is valid and enforceable against the parties in the following order of liability: (1) the City as successor trustee and the trust property; and (2) Citizens Gas. Chase is also entitled to a coercive judgment for the unpaid and overdue interest coupons, the judgment to include interest at 5% both on the coupons from maturity to the judgment and on the judgment from entry to satisfaction. Moreover this coercive judgment is enforceable against the parties in the following order of liability: (1) the City successor trustee and the trust property; (2) Citizens Gas; and (3) Indianapolis Gas. The District Court is directed to proceed in accord with this opinion. It is so ordered.

Endorsed: Filed June 6, 1940. Kenneth J. Carrick, Clerk.

And, on the same day, to-wit: On the sixth day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, June 6, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause appealed from be, and the same is hereby, reversed with costs taxed in favor of The Chase National Bank of the City of New York, Trustee, and that this cause be, and the same is hereby remanded to the said District Court with directions to enter a declaratory judgment for The Chase National Bank of the City of New York, Trustee, to the effect that the lease is valid and enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property; and

(2) The Citizens Gas Company.

It is further ordered and adjudged that this cause be further remanded to the said District Court with directions that The Chase National Bank of the City of New York, Trustee, also have a coercive judgment for the unpaid and overdue interest coupons, the judgment to include interest at five per cent (5%) both on the coupons from maturity to the judgment and on the judgment from entry to satisfaction.

It is further ordered and adjudged that this coercive judgment be enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property;

(2) Citizens Gas Company; and

(3) Indianapolis Gas Company.

It is further ordered, adjudged and decreed by this Court that the District Court proceed in accord with the opinion of this Court.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause appealed from be, and the same is hereby, reversed with costs taxed in favor of The Chase National Bank of the City of New York, Trustee, and that this cause be and the same is hereby remanded to the said District Court with directions to enter a declaratory judgment for The Chase National Bank of the City of New York, Trustee, to the effect that the lease is valid and enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property; and

(2) The Citizens Gas Company.

It is further ordered and adjudged that this cause be further remanded to the said District Court with directions that The Chase National Bank of the City of New York, Trustee, also have a coercive judgment for the unpaid and overdue interest coupons, the judgment to include interest at five per cent (5%) both on the coupons from maturity to the judgment and on the judgment from entry to satisfaction.

It is further ordered and adjudged that this coercive judgment be enforceable against the parties in the following order of liability:

(1) The City as Successor Trustee and the Trust Property;

(2) Citizens Gas Company; and

(3) Indianapolis Gas Company.

It is further ordered, adjudged and decreed by this Court that the District Court proceed in accord with the opinion of this Court.

And afterwards, to-wit: On the twentieth day of June, 1940, there was filed in the office of the Clerk of this Court, a petition for rehearing, which said petition for rehearing is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees*. } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee*, *vs.* The Indianapolis Gas Company, *Defendant-Appellant*. } and 7144.

Defendants-appellees City of Indianapolis and the members of its Board of Trustees for Utilities and its Board of Directors for Utilities, viz.: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, David J. Angus, Leroy J. Keach and John E. Ohleyer, respectfully petition the Court to grant a rehearing of said cause, to reconsider its opinion of June 6, 1940, and reverse its direction to the lower court to enter judgment against the City and to affirm the judgment of the lower court.

As grounds for this petition, these defendants-appellees submit that:

1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and

that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by agreement with its opponents and by order of the Court was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counter-claim and to have the lower Court determine whether when executed this lease was in fact burdensome.*

With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The right to a hearing extends both to a determination of question of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims the protection of the Fourteenth Amendment.

2. This court for the first time in its opinion of June 6, 1940, held that the Chase National Bank, plaintiff-appellant, was entitled to a decree that the lease of September 30, 1913, was enforceable against the City and that Chase was also entitled to a coercive judgment against the City. The Court on its own motion should have reconsidered its decision in *Chase National Bank of New York* v. *Citizens Gas Company*, 96 F. 2d 363, in which it held that The Indianapolis Gas Company was an indispensable party to the controversy, but in which it also sustained the jurisdiction of the lower court on the ground that there was a collision of interest between Chase and Indianapolis Gas on certain questions involved and that this fact prevented a realignment of Indianapolis Gas with Chase. The court erred in sustaining the jurisdiction of the lower court of the subject-matter of this controversy and directing judgment to be entered against the city because Indianapolis Gas should have been realigned with Chase and thus diversity of citizenship destroyed, because alignment of the parties in any case must be determined by their relation to the main controversy. In this case there is no collision of interest between plaintiff and Indianapolis Gas on the main issue involved, viz.: the enforceability of the lease against

the City. It is clear from the Court's opinion that all questions other than the question of the enforceability of the lease against the city were dependent upon the decision of that question.

3. The Court erred in not realigning Indianapolis Gas with Chase and directing the lower court to dismiss this cause for lack of jurisdiction of the subject-matter, because:

(a) The Court held that Chase was entitled to a coercive judgment for the unpaid and over-due interest represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

(1) The City and the trust property.
(2) Citizens Gas.
(3) Indianapolis Gas.

If a coercive judgment is entered against the City it may be mandated to pay that judgment through the medium of a tax levy. *Cox* v. *State*, 182 Ind. 497.

Even if this Court should modify or construe its opinion so that the judgment against the City would be payable solely out of the revenues from the property, there is still no possibility of the judgment being paid by Indianapolis Gas because the funds deposited in escrow and those remaining in the hands of the City from the operation of the property are more than sufficient to discharge the full amount of the judgment ordered entered. *The judgment will be against Indianapolis Gas in form only; in substance and reality it will be a judgment for the joint benefit of Chase and Indianapolis Gas against the City.*

The result is that in a case in which Indianapolis Gas is vitally interested in the enforcement of the lease and in procuring a coercive judgment requiring the City to pay the interest on its mortgage debt, this suit has been maintained in a Federal Court where no federal question is involved, where jurisdiction depends wholly on diversity of citizenship and a judgment ordered entered which as a practical proposition insulates Indianapolis Gas from possible coercion of payment.

(b) The result of the Court's opinion is that a judgment is ordered entered which will be equally beneficial to both Chase and Indianapolis Gas and which in reality

will amount to a judgment not against Indianapolis Gas but in its favor.

(c) The dominant question upon the answer to which depended the final decision in this cause was whether the lease was enforceable against the City and in that question Chase and Indianapolis Gas have identical interests.

(d) The decision of this Court is directly in conflict with controlling decisions of the United States Supreme Court wherein it is held that parties must be aligned in interest in accordance with their relation to the main controversy in the cause and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain the jurisdiction of the Court on the ground of diversity of citizenship.

4. This Court apparently relied on the decisions in the following cases as *res adjudicata* of some or all of the issues presented in this case and inferentially, although not directly, held that the City was estopped by such judgments:

Fishback v. *Public Service Commission*, 193 Ind. 282;
Williams v. *Citizens Gas Co.*, 206 Ind. 448;
Todd v. *Citizens Gas Co., et al.*, 46 F. 2d 855;
Cotter v. *Citizens Gas Co., et al.*, 46 F. 2d 855.

None of these cases is *res adjudicata* of any issue involved in this case and this court should have so held.

(See *Jones* v. *Vert, et al.*, 121 Ind. 140, 141.)

5. The Court erred in directing that a coercive judgment, *presumably payable out of the general revenues of the City*, be entered in favor of Chase, thus requiring municipal revenues raised by taxation to be applied if necessary in payment of rentals under a lease which had no municipal sanction and which was executed in direct violation of applicable Indiana statutes. There was no limitation in the Court's opinion that the unpaid coupons and interest on them to the date of judgment and interest on the judgment from date of entry to payment should be collectible only out of the revenues arising from the operation of Indianapolis Gas property. The Court has thus imposed a burden on the City not authorized by any statute and not supported, so far as we know, by any decision and contrary to the very terms of the lease itself.

6. The Court erred in holding and deciding that the

lease was valid and enforceable against the City. The decision of the Court in this respect is susceptible of a construction that the rental reserved in the lease may be collected from the City out of revenues raised by taxation whereas in no event could the City lawfully be required to pay such reserved rent except out of the net income of the leased property and or the trust property.

While the proposition urged in Subdivision 5, supra, of this petition for rehearing cannot under the facts of this case result in the use of revenue derived from taxation for the payment of rentals presently due, if the language of the opinion is unmodified it may result in the future in requiring the City to pay rentals out of such revenues.

7. This court apparently relied upon certain acts as showing that the City of Indianapolis was estopped to deny the enforceability against it of the lease of September 30, 1913, although there is no express holding to that effect. The Court erred in giving any weight to the claimed estoppel because there was no proof that any present holder of the bonds of the Indianapolis Gas Company knew of or relied upon any such act and in addition under the applicable Indiana law unauthorized acts of city officers cannot be made the basis of a recovery against the city. The court erred in failing to hold that the city was not estopped by any such acts of its officers.

8. This Court erred in holding that the 99 year lease between Citizens Gas and Indianapolis Gas was valid and was enforceable against the City.

9. The Court erred in holding that the City accepted the lease.

10. The Court erred in holding that the initial trustee, Citizens Gas and the successor trustee, the City, had power to purchase in fee simple the property of Indianapolis Gas and that therefore the attack of the City was only upon the mode of the acquisition of this property.

11. The Court in its opinion stated that the City did not claim that the lease was unenforceable against it on grounds of public policy. In this it erred because the City made such direct claim and that claim should have been sustained by this Court.

12. The Court erred in holding that the lease of September 30, 1913, executed by Citizens Gas and Indianapolis Gas was enforceable against the City because:

(a) When that lease was originally executed the City was not a party to it and it has never been

contended by Chase that the lease was originally binding against the City. Indeed, it could not be known until the property was taken over, which was only in 1935, whether under any theory of the case the City would be bound to the terms of that lease. The whole theory of Chase's presentation of this case in its complaint, the amendments thereto, its evidence and the briefs in this court is that the City became bound to the terms of the lease by estoppel, res adjudicata and the operation of the property. The Court has apparently decided this case on an issue which was not presented to the court by Chase for its determination, and has erroneously held the City liable under the terms of the lease although that lease was never approved by any proper municipal action. Indeed, the only action taken by the City was to reject the lease.

13. This Court erred in not holding the lease invalid because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly, 1905.

14. This Court erred in refusing to abide by the rule of United States Supreme Court laid down in the case of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that it did not apply the established law of the State of Indiana to the questions involved in this case, and in particular it did not apply the law of Indiana in its determination of the questions of estoppel against the City and the question of whether or not certain judgments rendered by the Indiana Supreme Court were res adjudicata.

Edward H. Knight,
Corporation Counsel,
Michael B. Reddington,
Attorney for City of Indianapolis,
William H. Thompson,
Patrick J. Smith,
Attorneys for Defendants-Appellees.

June 20, 1940.

Endorsed: Filed June 20, 1940. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twentieth day of June, 1940, there was filed in the office of the Clerk of this Court, a petition for reargument, which said petition for reargument is in the words and figures following, to-wit:

Nos. 7143 and 7144

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant,*
vs.
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.*
The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee,*
vs.
The Indianapolis Gas Company, *Defendant-Appellant.*

Nos. 7143 and 7144.
Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.
Honorable Robert C. Baltzell, Judge of said Court.

Petition of Defendant-Appellee City of Indianapolis and the Individual Defendants-Appellees Who Are Members of the Board of Trustees and Directors of the Department of Utilities of Said City for a Reargument of Said Causes.

Edward H. Knight,
Michael B. Reddington,
City Hall,
Indianapolis, Indiana,
William H. Thompson,
Patrick J. Smith,
Consolidated Building,
Indianapolis, Indiana.
Solicitors for said Defendants-Appellees.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1939, April Session, 1940.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.* } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee*, *vs.* The Indianapolis Gas Company, *Defendant-Appellant.* } and 7144

Defendants-Appellees City of Indianapolis and the members of its Board of Trustees and Directors for Utilities, viz.: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas D. Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, David J. Angus, Leroy J. Keach and John E. Ohleyer, respectfully petition the Court to grant, in connection with the rehearing requested by defendants-appellee, a reargument of this cause.

As grounds for this petition for a reargument these defendants-appellees submit that:

1. Under the decision of this Court as it now stands the Court has directed that a declaratory judgment be entered against the City determining the lease of September 30, 1913, as valid and a coercive judgment for unpaid interest coupons with interest thereon. This order has been made notwithstanding that this Court has held that if the lease was improvident or burdensome it could be declared to be invalid. Because the question of the bur-

densome character of the lease was reserved for future determination by the court without objection or exception by any parties the City has been deprived of its day in court and it should undoubtedly have the right to be heard on this issue before the lower court is directed to enter final judgment against the City.

2. The questions involved are of grave public importance inasmuch as the Court's decision imposes upon the City of Indianapolis a liability for future rentals of more than $45,000,000 under a lease which did not have the sanction of any proper municipal authority.

3. The Court has directed that a coercive judgment *presumably payable out of the general revenues of the City* be entered in favor of Chase, thus if necessary requiring revenues raised by taxation to be applied in payment of rentals under a lease which had no municipal sanction. If this be the correct interpretation of the court's decision then it follows that future rentals would be required to be paid by the city out of revenues raised from taxation if the revenue from the operation of the property were insufficient to pay the stipulated rentals. No such result can possibly be authorized by any statute or reported decision and is in direct conflict with the terms of the lease itself.

4. The Court misunderstood the position of the City in many important particulars, as for example, it stated in its opinion:

"Counsel for the City does not argue that the trustees lack the power to lease the property of its rival because such action might contravene public policy."

The Court entirely overlooked the averments contained in the city's answer and counter-claims (R. pp. 141 to 205, 314), and the argument of the City in its brief in this cause at pages 111-118, inclusive, where the point is expressly made that the lease in question was executed in direct violation of prohibitive Indiana statutes, was therefore void and could not be ratified or enforced by estoppel.

5. Because of the long record and the complicated nature of the factual situation the Court, in its written opinion, has inadvertently fallen into error in respect of important facts, and also in respect of the position taken by the City, all as pointed out in the City's brief on its petition for rehearing. The City should have an opportunity through its counsel to re-present its case orally to the Court so that the case may be decided in view of the

correct facts and the actual position taken by the City on such facts.

Respectfully submitted,

Edward H. Knight,
Corporation Counsel City of Indianapolis;
Michael B. Reddington,
Attorney for City of Indianapolis.
William H. Thompson,
Patrick J. Smith,
Attorneys for said Defendants-Appellees.

June 20, 1940.

Endorsed: Filed June 20, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the tenth day of July, 1940, there was filed in the office of the Clerk of this Court a stipulation re amplification of record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 7143 and 7144.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellant,
vs.
Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellee,
vs.
The Indianapolis Gas Company,
Defendant-Appellant.

STIPULATION RE AMPLIFICATION OF RECORD.

It Is Hereby Stipulated by all of the parties to these two causes that this Stipulation and the facts recited herein and the exhibits attached hereto may be made a part of the record in the two above entitled causes as fully and completely as though all of said matters had been included in the Transcript of Record as originally certified to this Court by the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

The signing and execution of this Stipulation by the parties hereto shall not be considered as an admission by any of the parties of the materiality or relevance of any of the material so added to the record.

It Is Further Stipulated that the following facts are true:

(1) On January 4, 1939, a pre-trial conference was held before the Honorable Robert C. Baltzell, Judge of

the United States District Court, in causes 1844 and 1950, In Equity, on the docket of said District Court. An excerpt from the official Reporter's transcript of said proceedings is attached hereto, marked "Exhibit A", and made a part hereof.

(2) The two causes now pending in this Court, namely, Nos. 7143 and 7144, are appeals from the judgment in cause No. 1844, In Equity, in the District Court of the United States for the Southern District of Indiana, Indianapolis Division. Cause No. 1950, In Equity on the docket of said District Court, entitled "Massachusetts Mutual Life Insurance Company, *et al.*, plaintiffs, *vs.* Citizens Gas Company of Indianapolis, *et al.*, defendants", was tried with cause No. 1844 but has not yet been decided by the District Court.

(3) On the 14th day of January, 1939, at a pre-trial conference held before the Honorable Robert C. Baltzell, in causes 1844 and 1950, In Equity, William H. Thompson, counsel for the City of Indianapolis, *et al.*, in both of said causes, presented a proposed form of order respecting the separate trial of certain issues in Cause 1844, a copy of which proposed form of order is attached hereto, marked "Exhibit D", and made a part hereof.

(4) On January 16, 1939, Howard F. Burns, counsel for plaintiffs in both causes 1844 and 1950, wrote and mailed a letter to Honorable Robert C. Baltzell, Judge of the United States District Court, enclosing a proposed form of order entitled "Order Directing Separate Trial of Certain Claims and Causes of Action and Reserving Other Claims and Causes of Action for Subsequent Trial." Copies of said letter of January 16, 1939, and the enclosed form of order are attached hereto, marked "Exhibit B" and "Exhibit C", respectively, and made a part hereof. Copies of said letter of January 16th (Exhibit B) and of the enclosed form of order (Exhibit C) were mailed on January 16, 1939 to counsel for each of the defendants in said causes.

(5) On February 27, 1939, counsel for plaintiffs in said causes 1844 and 1950 filed with the District Court a brief entitled "Plaintiffs' Brief on the Admissibility of Evidence to Support Allegations That the Lease of September 30, 1913 Is or Was Burdensome", and on the same day served copies of said brief on counsel for each of the defendants in said causes. An excerpt from said

brief is attached hereto, marked "Exhibit E", and made a part hereof.

William L. Taylor,
John Adams,
Howard F. Burns,
Solicitors for The Chase National Bank, Trustee, plaintiff-appellant in cause No. 7143 and plaintiff-appellee in cause No. 7144.
Louis B. Ewbank,
William R. Higgins,
Solicitors for The Indianapolis Gas Company, defendant - appellee in cause No. 7143 and defendant-appellant in cause No. 7144.
Edward H. Knight,
Michael B. Reddington,
William H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
Solicitors for the City of Indianapolis, et al., defendants-appellees in causes Nos. 7143 and 7144.
Paul G. Adams,
William G. Sparks,
Solicitors for Citizens Gas Company of Indianapolis, defendant-appellee in causes Nos. 7143 and 7144.

EXHIBIT A.

(pages 2-3):

"Be It Remembered, That, in the District Court of the United States, for the Southern District of Indiana, Indianapolis Division, at the United States Court House, in the City of Indianapolis, Indiana, on Wednesday, January 4, 1939, commencing at nine-thirty o'clock in the forenoon, the following proceedings were had in Chambers, before the Honorable Robert C. Baltzell, Judge of said Court.

Appearances:

The plaintiff, The Chase National Bank of the City of New York, Trustee, appeared by Thompson Kurrie, Esq., representing Messrs. Taylor & Carter, its attorneys.

The plaintiff, Massachusetts Mutual Life Insurance Company, appeared by Harvey J. Elam, Esq., representing Messrs. Fesler, Elam, Young & Fauvre, its attorneys.

The defendant, Citizens Gas Company of Indianapolis, appeared by Paul Y. Davis, Esq., and William G. Sparks, Esq., representing Messrs. Davis, Pantzer, Baltzell & Sparks, its attorneys.

The defendants, City of Indianapolis and the individual defendants who are members of the Board of Trustees and Directors for the Utilities of the City of Indianapolis, appeared by William H. Thompson, Esq., and Albert L. Rabb, Esq., representing Messrs. Thompson & Rabb, their attorneys.

The defendant, The Indianapolis Gas Company, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, and by William R. Higgins, Esq., representing Messrs. McTurnan & Higgins, its attorneys.

The defendant, The Indiana National Bank, appeared by Louis B. Ewbank, Esq., representing Messrs. Ewbank, Dowden & Adams, its attorneys.

The Court: I want to take up these Gas cases this morning, informally. I believe that they are assigned for trial on January 24th. Is that right?"

* * * * * *

(pages 23-26):

* * * * * *

"Mr. Elam: I think there was a motion to strike out parts of their Answer, that you haven't mentioned.

The Court. You mean in the Chase case?

Mr. Elam: I think it is in both the Chase case and the bondholders case.

The Court: There was a motion, there on the consolidation, that I didn't think was necessary to mention at this time.

Mr. Thompson: There is a motion in each case, your Honor, by the plaintiff to strike out that part of our Answer which alleges that this lease was burdensome.

The Court: Is it necessary to go into that at this time? Wouldn't that come under the further hearing, if it is necessary?

Mr. Thompson: We claim that that goes to the question of the validity and the binding effect of this lease upon the City of Indianapolis and, inasmuch as we didn't

sign the lease—the City didn't sign the lease—and inasmuch as the leased property was not a part of the corpus of the public charitable trust when the City took it over,—

The Court: I don't have that motion. It doesn't seem to be among these papers which I have here. I had in mind that those questions and the question with reference to the burdensome lease perhaps might not enter into the question of the validity of the lease so much. They are seeking to strike that from your Answer?

Mr. Thompson: Yes. My thought on that was that, if there is nothing in his proposition as a legal proposition, we don't need to go into the fact, whether it is a fact or not.

The Court: It would require some proof, wouldn't it?

Mr. Thompson: A substantial amount.

The Court: Well, I didn't have in mind going into that question at this time. I don't know whether that would be necessary to determine the validity of the lease or not.

Mr. Elam: Well, I suppose when we have our hearing, we could prove that question then in connection with the validity of the lease, on the assumption that the fact is one way or the other and, then, let it go until later to find out what the fact is.

The Court: That motion is just to strike out those allegations. I would think the allegations would be proper. It is in the Massachusetts Mutual case, a motion to strike immaterial matter from the Answer and the counterclaim of the defendant, City of Indianapolis. I assume that is the motion. I will go into that. I will examine that question and pass on it before the time for the hearing.

I notice there is cited here *Public Service Commission* versus *Indianapolis*, 193 Indiana. Somebody gave me that citation.

Mr. Thompson: When you have reached a conclusion on that question, your Honor, will you also notify counsel as to whether any evidence is to be heard in respect to that issue?

The Court: Yes. My present thought would be, if it just goes to the question of striking that out, that the motion would not be well taken. However, I want to go into that question.

Mr. Elam: I think the motion is well taken and it will simplify the case a good deal if it is sustained.

The Court: I thought I had it simplified once, but the other court said I didn't.

Is that in both cases?

Mr. Thompson: Yes, sir, I think so.

The Court: I don't find it in the Chase National Bank case. I will look through the file later.

I will take up this matter of the motion to strike within a very short time.

Mr. Elam: All right.

The Court: I am sorry I did not have that in mind. I thought I had in mind everything that had been presented."

* * * * * *

EXHIBIT B.

Baker, Hostetler & Patterson
Union Commerce Building
Cleveland

Received
January 17 1939
Albert C. Sogemeier,
Clerk

US Clerk

January 16, 1939.

Honorable Robert C. Baltzell,
Judge,
United States District Court,
Federal Building,
Indianapolis, Indiana.

Dear Judge Baltzell:

re: Chase National Bank, Trustee, *vs.* Citizens Gas Company, et al.; In equity No. 1844.

Massachusetts Mutual Life Insurance Company, et al. *vs.* Citizens Gas Company, et al.; In Equity No. 1950.

I am taking the liberty of writing you further in regard to the proposed order directing separate trial of certain claims and causes of action because I had no opportunity to see the order proposed by Mr. Thompson until he presented it to you Saturday morning. I am sending a copy of this letter to counsel for each of the defendants.

It seems to us that the form of order presented by Mr. Thompson on Saturday is designed to prevent the trial of many issues which are purely matters of law and should be decided at the first trial of the case. The order presented by the City would almost certainly require a second trial.

Plaintiffs on the other hand, are anxious to have the validity of the lease determined and all other questions which may be presented upon the same evidence without any additional burden upon the Court, because they feel that this will in all probability avoid the necessity of any further trial.

Several issues which we wish to have presented at the first trial, but which are excluded by the City's form of order, will require no evidence in addition to that produced on the question of the validity of the lease. Among these issues are:

(1) Whether plaintiffs are entitled to a judgment against The Indianapolis Gas Company.

This issue does not relate in any way to the validity of the lease, but is fully presented by the allegations and admissions of the pleadings as they now stand.

(2) Whether plaintiffs are entitled to interest on the unpaid instalments of interest on said bonds from the time when such instalments became due and are entitled to their costs and expenses in the prosecution of these cases.

No additional evidence will be required on these issues and the question as to the amount, if any, of the allowance for plaintiffs' expenses is expressly reserved.

We believe that it is particularly necessary to have express provisions in the order such as those included in our tendered form of order, one of which reads as follows:

"In the determination of said questions all grounds based upon the facts alleged in plaintiff's bill of complaint as amended and supplemented, or in any of the answers or counterclaims filed herein, for entering judgment, or refusing to enter judgment, against any of said persons or any of said property for the items enumerated shall be tried and determined."

A single example will illustrate why we consider this language necessary. It is admitted by the pleadings that the Citizens Gas Company conveyed all of its property to the City, thus leaving it no assets with which to satisfy

any of its creditors. If the Court comes to the conclusion that the lease is binding upon the Citizens Gas Company but not binding upon the City, the obligations of the lease or the judgment against Citizens Gas Company for the rent under the lease would be a valid claim against the property of Citizens Gas Company which was transferred to the City in violation of the rights of the creditors of Citizens Gas. This and other similar questions will require no additional evidence and should be submitted and passed upon at the first trial so that we can have one trial and one review of all these questions.

Since Mr. Thompson objected to the length of the order which we presented to the Court and defendants' counsel on Friday, we have redrafted the order and I am enclosing a copy of the order as redrafted herewith. There are two principal changes in this order from the one which we originally submitted. First, we have simply reserved for the subsequent trial all issues not enumerated, without enumerating any of the reserved issues. Second, with respect to the burdensomeness of the lease, we have in large part adopted Mr. Thompson's language in his form of order as presented on Saturday.

We believe it is important to have an explicit order defining which issues are to be tried and which reserved, because it may be necessary two or three years from now for counsel and some appellate court to know precisely what issues were presented and what issues were reserved. A definite order which makes these distinctions clear is essential to the protection of the Court and all parties.

It is the earnest wish of the plaintiffs and plaintiffs' counsel that the first trial shall include those issues which will in all probability dispose of the entire controversy. They hope by this method to dispose of the entire case by one trial and one review. We believe the order tendered by the City will effectually prevent this very desirable result.

Respectfully submitted,
(signed) Howard F. Burns.
Howard F. Burns.

T:2A
enclosure
1494-G-1-a
cc William R. Higgins, Esq.
Honorable Louis B. Ewbank.
William H. Thompson, Esq.
William G. Sparks, Esq.

EXHIBIT C.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Indiana,

Indianapolis Division.

In Equity No. 1844.

The Chase National Bank of the City of New York, Trustee, *Plaintiff,*
vs.
Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*

ORDER DIRECTING SEPARATE TRIAL OF CERTAIN CLAIMS AND CAUSES OF ACTION AND RESERVING OTHER CLAIMS AND CAUSES OF ACTION FOR SUBSEQUENT TRIAL.

This day this matter came on to be heard upon the application of the parties for an order directing a separate trial of certain claims, causes of action, questions, and issues, and reserving certain other claims, causes of action, questions, and issues for a subsequent trial, and the Court being fully advised in the premises finds that it will be to the advantage and convenience of both the Court and the parties to make such a separation of claims, causes of action, questions, and issues.

It is therefore ordered, in pursuance of the provisions of Rules 42 and 54 of the Rules of Civil Procedure, that the following claims, causes of action, questions, and issues shall be determined upon the first trial of this action and appropriate judgments entered accordingly:

I. Whether the obligations of the lease between The Indianapolis Gas Company and Citizens Gas Company dated September 30, 1913, particularly as to the payment of rental and performance of other executory obligations to be paid or performed after September 9, 1935, are binding on

a. The Indianapolis Gas Company,
b. The Citizens Gas Company of Indianapolis,
c. The City of Indianapolis,

d. The Utility District of the City of Indianapolis, and

e. The property formerly owned by Citizens Gas Company and conveyed to the City of Indianapolis on or about September 9, 1935,

or any one of more of said persons or said property. In the determination of said questions all grounds based upon the facts alleged in plaintiff's bill of complaint as amended and supplemented, or in any of the answers or counterclaims filed herein, for imposing or refusing to impose, the obligations of said lease upon any of said persons or said property shall be tried and determined.

II. Whether the plaintiff is entitled to judgment against

a. The Indianapolis Gas Company,

b. The Citizens Gas Company of Indianapolis,

c. The City of Indianapolis,

d. The Utility District of the City of Indianapolis, and

e. The property formerly owned by Citizens Gas Company and conveyed to the City of Indianapolis on or about September 9, 1935,

or any one or more of said persons or said property, for any one or more of the following items:

(1) Interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of The Indianapolis Gas Company which has accrued since April 1, 1936, and the amount of such interest;

(2) Interest on the unpaid instalments of interest on said Bonds, from the time when such instalments became due to the time of judgment, and the amount of such interest;

(3) The costs and expenses of the plaintiff in and about the bringing and prosecution of this suit, including reasonable attorney's fees for plaintiff's solicitors, reserving, however, the question of the amount of such costs, expenses, and fees for later determination.

In the determination of said questions all grounds based upon the facts alleged in plaintiff's bill of complaint as amended and supplemented, or in any of the answers or counterclaims filed herein, for entering judgment, or refusing to enter judgment, against any of said persons or any of said property for the items enumerated shall be tried and determined.

It is further ordered that all other claims, causes of action, questions, and issues raised by the pleadings herein be reserved for subsequent trial.

It appearing further to the Court that one certain reason has been asserted in the separate answer and counter-

claim of the City of Indianapolis, *et al.*, why said lease of September 30, 1913, [illegible]t be enforceable against the City of Indianapo[illegible]gainst the property formerly owned by the C[illegible]as Company and conveyed to the City of Indianapolis on or about September 9, 1935, viz., that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject the assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust, and it further appearing that a substantial amount of evidence may be required on this issue and will put an unwarranted burden upon the time of the Court, and that such questions should, if material, be referred to a Special Master for report prior to the final decision of the claims, causes of action, questions, and issues to be separately heard at the first trial;

It is hereby ordered that the issues arising out of said certain reason for the claimed unenforceability of said lease and all evidence as to the burdensomeness of said lease or the value of said leasehold estate shall not be presented to the Court at the time of the first trial of the claims, causes of action, questions, and issues hereinbefore enumerated in subdivisions I and II of this order, but that as a part of the first trial of said claims, causes of action, questions, and issues the Court will decide whether such evidence is material to the determination of the claims, causes of action, questions, and issues to be determined at said first trial. If the Court then decides that such allegations of the City of Indianapolis, *et al.*, are material to the determination of the issues before it at the first trial, the Court will then refer the issues made by such allegations of the City of Indianapolis, *et al.*, to a special master to be appointed by the Court.

.....

District Judge.

Dated ....., 1939.

Endorsed: In the District Court of the United States For the Southern District of Indiana Indianapolis Division In Equity—No. 1844 The Chase National Bank of the City of New York, Trustee, Plaintiff, *vs.* Citizens Gas Company of Indianapolis, et al., Defendants Order Directing Separate Trial of Certain Claims and Causes of Action and Reserving Other Claims and Causes of Action For Subsequent Trial.

EXHIBIT D.

No. 1844 in Equity.

ORDER.

There shall first be tried the issue as to whether the lease dated September 30, 1913, from The Indianapolis Gas Company to Citizens Gas Company of Indianapolis, is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from Citizens Gas Company of Indianapolis on September 9, 1935; or against The Indianapolis Gas Company; or against Citizens Gas Company of Indianapolis; with the one exception, that there shall not be tried therewith but the trial thereof shall be deferred, one certain reason for claimed unenforceability of such lease against the City of Indianapolis or its said property, viz. that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust.

The trial of all other issues in this case is deferred until the further order of the court, with the right reserved to refer any or all of such issues to a special master.

EXHIBIT E.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

The Chase National Bank of the City of New York, Trustee, *Plaintiff*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*	In Equity No. 1844.
Massachusetts Mutual Life Insurance Company, *et al.*, *Plaintiffs*, *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants.*	In Equity No. 1950.

PLAINTIFFS' BRIEF ON THE ADMISSIBILITY OF EVIDENCE TO SUPPORT ALLEGATIONS THAT THE LEASE OF SEPTEMBER 30, 1913 IS OR WAS BURDENSOME.

The plaintiff in cause 1844 and plaintiffs in cause 1950 (hereinafter collectively called the "plaintiffs") moved the Court to strike from the answer and counterclaim of the City of Indianapolis and its Trustees and Directors for Utilities (hereinafter collectively called the "City") in each cause, all allegations that the rentals required by the lease of September 30, 1913 are excessive or that the lease is burdensome. Although those motions were overruled, it plainly appears that none of these allegations is in any way material or relevant to the issue as to the validity and present binding effect of the lease, whatever possible relevancy they might have to some of the issues reserved for trial at a later date.

The order entered by this Court on January 18, 1939, provides that the evidence as to one alleged reason for the City's claim that the lease of September 30, 1913

(hereinafter called the "Lease") is not enforceable against it or the property which it received from Citizens Gas Company, namely that the City can reject the Lease on the ground that it is burdensome, shall be deferred, this matter to be tried at a later date if found to be relevant or necessary to the determination of the question whether the Lease is now valid and binding. The plaintiffs will object to the admission of any such evidence and to having a subsequent trial for the presentation of such evidence, on the ground that none of it is relevant to the question whether the Lease is binding upon the City or any of its property. This brief is submitted in support of plaintiffs' contentions on this point.

There are three distinct reasons why the evidence proffered by the City as to the burdensomeness of the Lease is wholly immaterial in determining whether the Lease is binding upon the City.

First: The parties, including the City, are estopped by prior adjudications of this question.

Second: Both the Citizens Gas Company and the City are estopped by their laches in failing to object for a period of twenty-two years that the Lease was burdensome and in accepting during the meantime all of the benefits arising from said Lease.

Third: A party to a contract—otherwise valid—or its successor in interest, cannot escape the obligations of such contract by proving that such obligations either were originally or have later become burdensome.

[Here follows on pages 3 to 20, inclusive, a discussion of the facts and the law presented by counsel for plaintiffs.]

Conclusion.

It is respectfully submitted that the evidence tendered by the City to establish the burdensomeness of the Lease cannot properly be admitted unless the Court finds affirmatively for the City on every one of the following propositions:

First: That the Public Service Commission did not determine that the Lease was in the public interest or that the City is now entitled to make a collateral attack upon that determination.

Second: That the City is now entitled to repudiate

the positions which it took in the *Fishback* and *Williams* cases that the Lease was entirely valid and was not burdensome.

Third: That the City is not concluded by the judgment in the *Williams* case, to which it was a party, establishing the validity of the Lease and holding that evidence as to the burdensomeness of the Lease did not justify invalidating it at the suit of a beneficiary of the trust.

Fourth: That the acquiescence in the Lease and the acceptance of the benefits thereunder, for a period of twenty-two years, by the City, and Citizens Gas Company, its predecessor in title, and by the inhabitants of Indianapolis as beneficiaries of the public charitable trust, do not constitute laches.

Fifth: That a party to a contract, or its successor, is entitled to escape from the obligations of an otherwise binding contract, which has been recognized and acted under for twenty-two years, because in the light of the present facts the contract is an improvident one.

As shown by the foregoing brief, the City cannot establish any one of these five propositions and since the failure to establish any one of them requires the exclusion of the evidence, we submit that any evidence as to the burdensomeness of the Lease should be excluded.

Respectfully submitted,

Howard F. Burns,
1956 Union Commerce Building,
Cleveland, Ohio.

Wm. L. Taylor,
State Life Building,
Indianapolis, Indiana.

Solicitors for The Chase National Bank, Trustee, Plaintiff, in Cause 1844.

Howard F. Burns,
1956 Union Commerce Building,
Cleveland, Ohio.

Harvey J. Elam,
129 East Market Street,
Indianapolis, Indiana.

Solicitors for Plaintiffs in Cause 1950.

Dated 2-27-39.

Copies of the foregoing brief have been served on Counsel for each defendant herein this 27th day of February, 1939.

Howard F. Burns.

Endorsed: Filed July 10, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the nineteenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, July 19, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition of City of Indianapolis and the individual members of the Boards of Utilities of the City of Indianapolis for the issuance of a writ of certiorari to the District Court to certify to this Court a transcript of certain proceedings be, and the same is hereby denied.

It is further ordered by the Court that the stipulation of counsel filed in this Court on July 10, 1940, relative to amplification of the record be, and the same is hereby approved.

And on the same day, to-wit: On the nineteenth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, July 19, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant.*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the opinion of this Court filed on June 6, 1940, in these causes be, and it is hereby, amended as follows: On page 1, line 12, the words "a bond holder and as" are deleted; on page 12, line 27, the word "accepted" is deleted and the word "received" is substituted therefor; on page 13, line 14, the words "and power" are deleted; on page 17, line 34, the words "does not argue" are deleted and the words "argues but not impressively" are substituted therefor; and on page 26, line 34, after the words "the City" the words "as successor trustee" are inserted.

And on the same day, to-wit: On the nineteenth day of July, 1940 the following further proceedings were had and entered of record, to-wit:

Friday, July 19, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant.*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee.*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a reargument of these appeals be, and the same is hereby denied.

It is further ordered by the Court that the petition for a rehearing of these appeals be, and the same is hereby denied.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant.*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee.*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for The City of Indianapolis, et al., it is ordered that the mandates of this Court in these appeals be, and the same are hereby, stayed 90 days, and if

during such period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court certifying that a petition for a writ of certiorari has been filed therein, then the said mandates shall be further stayed until final disposition of the case by the Supreme Court.

And afterwards, to-wit: On the twenty-fifth day of July, 1940, there was filed in the office of the Clerk of this Court, a stipulation as to printing of record, which said stipulation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 7143 and 7144.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellant,
vs.
Citizens Gas Company of Indianapolis, *et al.*,
Defendants-Appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-Appellee,
vs.
The Indianapolis Gas Company,
Defendant-Appellant.

STIPULATION AS TO PRINTING OF RECORD.

It is hereby stipulated by all of the parties to this proceeding, in pursuance of the provisions of paragraph 8 of Rule 38 of the Revised Rules of the Supreme Court of the United States (effective February 27, 1939) that only parts of the transcript of record of the above cases in the United States Circuit Court of Appeals for the Seventh Circuit, in addition to the transcript of record of the United States District Court for the Southern District of Indiana, Indianapolis Division, shall be printed, and that the parts hereinafter stipulated to be printed are the only parts of the record of the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit (in addition to the transcript of record of the United States Dis-

trict Court for the Southern District of Indiana, Indianapolis Division, pages 1 to 1238, inclusive), material to the determination of the questions presented by the petition for the writ of certiorari.

It is hereby stipulated by all the parties to this proceeding that the Clerk shall print the entire transcript of the record of the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, with the exception of the particular matters hereinafter specifically enumerated, to wit:

(2) Motion to extend time for oral argument, dated November 27, 1939, and supporting papers.

(3) Motion for leave to file briefs exceeding 75 pages in length, dated November 27, 1939, and supporting papers.

(4) Order of November 27, 1939, permitting filing of briefs not exceeding 200 pages in length.

(5) Stipulation correcting record as to "Findings of Fact and Conclusions of Law submitted by City of Indianapolis."

(6) Supplemental stipulation as to printing of record.

(7) Petition of defendants-appellees City of Indianapolis, *et al.*, for extension of time in which to file briefs, and all affidavits and briefs in support thereof or in opposition thereto.

(8) Motion to advance causes on calendar, dated January 9, 1940, and all papers, briefs, or affidavits filed in support thereof or in opposition thereto.

(9) Verified petition on behalf of Citizens Gas Company of Indianapolis for extension of time to file brief, and all papers, briefs, or affidavits filed in support thereof or in opposition thereto.

(10) "Motion of the City of Indianapolis and the Individual Members of the Boards of Trustees and Directors, Defendants-Appellees, in Reply to Brief of Plaintiff-Appellant in Opposition to Petition of the City of Indianapolis and the Boards, etc., for an Extension of Time in which to file their Brief in the above Entitled Causes" and the exhibits attached thereto.

(11) Motion of The Chase National Bank, Trustee, plaintiff-appellee in cause No. 7144, dated January 20, 1940, for extension of time to file brief as appellee.

(12) Consent to granting motion of The Chase National Bank, Trustee, for extension of time in which to file its brief as appellee in cause No. 7144.

(13) Petition of The Indianapolis Gas Company, defendant-appellant, for extension of time to file reply briefs.

(14) Motion of The Chase National Bank, Trustee, dated March 5, 1940, for extension of time to file reply brief.

(15) Consent to granting of the motion of The Chase National Bank, Trustee, for extension of time to file reply brief.

(16) Petition of defendants-appellees for writ of certiorari to the United States District Court for the Southern District of Indiana, Indianapolis Division, and all papers, briefs, and affidavits filed in support thereof or in opposition thereto.

(17) Motion of City of Indianapolis, *et al.*, for stay of mandate, dated July 22, 1940, and all papers, affidavits, or briefs filed in support thereof or in opposition thereto.

(18) Briefs of all parties filed in the United States Circuit Court of Appeals for the Seventh Circuit, either on the merits, on the petition for rehearing, or in any other connection.

(19) All proofs of service of briefs or other papers.

Howard F. Burns,
John Adams,
William L. Taylor,
Attorneys for The Chase National Bank of the City of New York, Trustee, etc.
Louis B. Ewbank,
William R. Higgins,
Attorneys for The Indianapolis Gas Company.
Paul G. Davis,
William G. Sparks,
Attorneys for Citizens Gas Company of Indianapolis.
W. H. Thompson,
Attorney for City of Indianapolis and the indiridual members of the Board of Trustees and Directors of the Department of Utilities.

Endorsed: Filed July 25, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the seventh day of August, 1940, there was filed in the office of the Clerk of this court, a motion for leave to file a petition for rehearing, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant,* *vs.* Citizens Gas Company of Indianapolis, *et al.*, *Defendants-Appellees.* } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee,* *vs.* The Indianapolis Gas Company, *Defendant-Appellant.* } and 7144.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Comes now defendant-appellees City of Indianapolis and the individual members of its Board of Trustees for Utilities and its Board of Directors for Utilities, viz.: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, Donald J. Angus, Leroy J. Keach and John E. Ohleyer, and respectfully move this Court for permission to file a petition for rehearing addressed to the opinion of this Court in the above entitled causes as modified by this Court, a copy of

which petition for rehearing and brief thereon is attached hereto, marked Exhibit A, and made a part of this motion as though fully set out herein.

Respectfully submitted,
Edward H. Knight,
Corporation Counsel,
Michael B. Reddington,
Attorney for City of Indianapolis,
William H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
Attorneys for Defendants-Appellees.

August 7, 1940.

Endorsed: Filed August 7, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for rehearing and brief in support of petition, which said petition and brief are in the words and figures following, to-wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellant,

v.

CITIZENS GAS COMPANY OF INDIANAPOLIS, et al,
Defendants-Appellees.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellee,

v.

THE INDIANAPOLIS GAS COMPANY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

Honorable Robert C. Baltzell, Judge of Said Court.

PETITION FOR REHEARING AND BRIEF THEREON OF DEFENDANT-APPELLEE CITY AND THE INDIVIDUAL DEFENDANTS-APPELLEES WHO ARE MEMBERS OF THE BOARDS OF TRUSTEES AND DIRECTORS OF THE DEPARTMENT OF UTILITIES OF SAID CITY.

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
City Hall,
Indianapolis, Ind.
WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Consolidated Building,
Indianapolis, Indiana.
Solicitors for Said Defendants-Appellees.

1344

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellant,
v.
CITIZENS GAS COMPANY OF INDIANAPOLIS, ET AL.,
Defendants-Appellees.

Nos. 7143

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc.,
Plaintiff-Appellee,
v.
THE INDIANAPOLIS GAS COMPANY,
Defendant-Appellant.

and 7144.

Defendants-appellees City of Indianapolis and the members of its Board of Trustees for Utilities and its Board of Directors for Utilities, viz: A. Dallas Hitz, Edward W. Harris, Charles S. Rauh, Merle E. Sidener, Thomas Sheerin, Henry L. Dithmer, Brodehurst Elsey, Roy Sahm, Isaac E. Woodard, David J. Angus, Leroy J. Keach and John E. Ohleyer, respectfully petition the Court to grant a rehearing of said cause, to reconsider its opinion of June

6, 1940, as modified and reverse its direction to the lower court to enter judgment against the City and to affirm the judgment of the lower court.

As grounds for this petition, these defendants-appellees submit that:

1. This Court held that a Trustee of a public charitable trust had no right to make a long term burdensome lease; that it incurred liability to the beneficiaries if it did so and that in addition the beneficiaries were entitled to have such a lease set aside. *This Court therefore held that if a showing could be made that the lease was in fact burdensome it could be set aside and yet it has directed a final judgment to be entered against the City which by order of the Court entered without objection or exception by any of the parties was still to have the right to prove the burdensome character of the lease. If every other question raised by this petition for rehearing should be decided adversely to the defendants-appellees we ask that the order of the Court be modified so as to permit the City to have an opportunity to prove the averments of its counter-claim and to have the lower Court determine whether when executed this lease was in fact burdensome.*

With no opportunity for a hearing on this reserved issue, the defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

The right to a hearing extends both to a determination of question of fact and law by the trial court. The denial of a hearing on either is a denial of due process. The City affirmatively claims the protection of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States and each of them.

2. This court for the first time in its opinion of June 6, 1940, held that the Chase National Bank, plaintiff-appellant, was entitled to a decree that the lease of September 30, 1913, was enforceable against the City and that Chase was also entitled to a coercive judgment against the City. The Court on its own motion should have reconsidered its decision in *Chase National Bank of New York v. Citizens Gas Company*, 96 F. 2d 363, in which it held that The Indianapolis Gas Company was an indispensable party to the controversy, but in which it also sustained the jurisdiction of the lower court on the ground that there was a collision of interest between Chase and Indianapolis Gas on certain questions involved and that this fact prevented a realignment of Indianapolis Gas with Chase. The court erred in sustaining the jurisdiction of the lower court of the subject-matter of this controversy and directing judgment to be entered against the city because Indianapolis Gas should have been realigned with Chase and thus diversity of citizenship destroyed, because alignment of the parties in any case must be determined by their relation to the main controversy. In this case there is no collision of interest between plaintiff and Indianapolis Gas on the main issue involved, viz: the enforceability of the lease against the City. It is clear from the Court's opinion that all questions other than the question of the enforceability of the lease against the city were dependent upon the decision of that question.

3. The Court erred in not realigning Indianapolis Gas with Chase and directing the lower court to dismiss this cause for lack of jurisdiction of the subject-matter, because:

(a) The Court held that Chase was entitled to a coercive judgment for the unpaid and over-due interest

represented by the coupons together with five per cent interest thereon from maturity to judgment and five per cent interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

(1) The City and the trust property.

(2) Citizens Gas.

(3) Indianapolis Gas.

If a coercive judgment is entered against the City it may be mandated to pay that judgment through the medium of a tax levy. *Cox v. State*, 182 Ind. 497.

Even if this Court should modify or construe its opinion so that the judgment against the City would be payable solely out of the revenues from the property, there is still no possibility of the judgment being paid by Indianapolis Gas because the funds deposited in escrow and those remaining in the hands of the City from the operation of the property are more than sufficient to discharge the full amount of the judgment ordered entered. *The judgment will be against Indianapolis Gas in form only; in substance and reality it will be a judgment for the joint benefit of Chase and Indianapolis Gas against the City.*

The result is that in a case in which Indianapolis Gas is vitally interested in the enforcement of the lease and in procuring a coercive judgment requiring the City to pay the interest on its mortgage debt, this suit has been maintained in a Federal Court where no federal question is involved, where jurisdiction depends wholly on diversity of citizenship and a judgment ordered entered which as a practical proposition insulates Indianapolis Gas from possible coercion of payment.

(b) The result of the Court's opinion is that a judgment is ordered entered which will be equally beneficial to both Chase and Indianaplois Gas and which in reality will amount to a judgment not against Indianapolis Gas but in its favor.

(c) The dominant question upon the answer to which depended the final decision in this cause was whether the lease was enforceable against the City and in that question Chase and Indianapolis Gas have identical interests.

(d) The decision of this Court is directly in conflict with controlling decisions of the United States Supreme Court wherein it is held that parties must be aligned in interest in accordance with their relation to the main controversy in the cause and the fact that there are dependent controversies in respect of which their interest may be adverse is not sufficient to sustain the jurisdiction of the Court on the ground of diversity of citizenship.

4. This Court apparently relied on the decisions in the following cases as res adjudicata of some or all of the issues presented in this case and inferentially, although not directly, held that the City was estopped by such judgments:

Fishback v. Public Service Commission, 193 Ind. 282;
Williams v. Citizens Gas Co., 206 Ind. 448;
Todd v. Citizens Gas Co., et al, 46 F. 2d 855;
Cotter v. Citizens Gas Co., et al, 46 F. 2d 855.

None of these cases is res adjudicata of any issue involved in this case and this court should have so held.

(See *Jones v. Vert et al.*, 121 Ind. 140, 141.)

5. The Court erred in directing that a coercive judgment, *presumably payable out of the general revenues of the City*, be entered in favor of Chase, thus requiring municipal revenues raised by taxation to be applied if necessary in payment of rentals under a lease which had no municipal sanction and which was executed in direct violation of applicable Indiana statutes. There was no limitation in the Court's opinion that the unpaid coupons and interest on them to the date of judgment and interest on the judgment from date of entry to payment should be collectible only out of the revenues arising from the operation of Indianapolis Gas property. The Court has thus imposed a burden on the City not authorized by any statute and not supported, so far as we know, by any decision and contrary to the very terms of the lease itself.

6. The Court erred in holding and deciding that the lease was valid and enforceable against the City. The decision of the Court in this respect is susceptible of a construction that the rental reserved in the lease may be collected from the City out of revenues raised by taxation whereas in no event could the City lawfully be required to pay such reserved rent except out of the net income of the leased property and/or the trust property.

While the proposition urged in Subdivision 5, supra, of this petition for rehearing cannot under the facts of this case result in the use of revenue derived from taxation for the payment of rentals presently due, if the language of the opinion is unmodified it may result in the future in requiring the City to pay rentals out of such revenues.

7. This court apparently relied upon certain acts as showing that the City of Indianapolis was estopped to deny the enforceability against it of the lease of September 30,

1913, although there is no express holding to that effect. The Court erred in giving any weight to the claimed estoppel because there was no proof that any present holder of the bonds of the Indianapolis Gas Company knew of or relied upon any such act and in addition under the applicable Indiana law unauthorized acts of city officers cannot be made the basis of a recovery against the city. The court erred in failing to hold that the city was not estopped by any such acts of its officers.

8. This Court erred in holding that the 99 years lease between Citizens Gas and Indianapolis Gas was valid and was enforceable against the City.

9. The Court erred in holding that the City accepted the lease.

10. The Court erred in holding that the initial trustee, Citizens Gas and the successor trustee, the City, had power to purchase in fee simple the property of Indianapolis Gas and that therefore the attack of the City was only upon the mode of the acquisition of this property.

11. The Court in its opinion stated that the City did not claim that the lease was unenforceable against it on grounds of public policy. In this it erred because the City made such direct claim and that claim should have been sustained by this Court.

12. The Court erred in holding that the lease of September 30, 1913, executed by Citizens Gas and Indianapolis Gas was enforceable against the City because:

> (a) When that lease was originally executed the City was not a party to it and it has never been contended by Chase that the lease was originally binding against the City. Indeed, it could not be known until the property was taken over, which was

only in 1935, whether under any theory of the case the City would be bound to the terms of that lease. The whole theory of Chase's presentation of this case in its complaint, the amendments thereto, its evidence and the briefs in this court is that the City became bound to the terms of the lease by estoppel, res adjudicata and the operation of the property. The Court has apparently decided this case on an issue which was not presented to the court by Chase for its determination, and has erroneously held the City liable under the terms of the lease although that lease was never approved by any proper municipal action. Indeed, the only action taken by the City was to reject the lease.

13. This Court erred in not holding the lease invalid because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly, 1905.

14. This Court erred in refusing to abide by the rule of United States Supreme Court laid down in the case of *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in that it did not apply the established law of the State of Indiana to the questions involved in this case, and in particular it did not apply the law of Indiana in its determination of the questions of estoppel against the City and the question of whether or not certain judgments rendered by the Indiana Supreme Court were res adjudicata.

EDWARD H. KNIGHT,
Corporation Counsel,

MICHAEL B. REDDINGTON,
Attorney for City of Indianapolis,

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for Defendants-Appellees.

BRIEF

ON PETITION FOR

REHEARING

INDEX

TABLE OF CASES

STATUTES

SUMMARY OF ARGUMENT.

I.

(Brief, pages 1-9.)

The decision of this Court entered on June 6, 1940, as modified, denies to the City and individual defendants due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment to the United States Constitution and each of them, in this:

(a) The lower court, by agreement of parties, reserved for future determination the question of the burdensome character of the lease entered into on September 30, 1913. The judgment ordered entered by this Court declaring the lease to be enforceable against the City and a coercive judgment for unpaid interest, denies to the defendants their day in court on the question of whether Citizens Gas as initial trustee executed a lease burdensome in character and beyond its power to agree to.

(b) Due process of law entitles defendants to a hearing and a decision by the trial court on the law questions (as well as the facts) as to whether the order of the Public Service Commission approving the lease or the decision in the Williams case decided the question of burdensomeness. This hearing to which defendants are entitled has never been given them, and the judgment ordered entered by this Court precludes them from such hearing and thus denies to them the due process of law guaranteed by the Fifth Amendment and the Fourteenth Amendment and each of them to the United States Constitution.

II.

(Brief, pages 9-14.)

The Court erred in sustaining the jurisdiction of the lower court on the subject-matter of this controversy and directing judgment to be entered against the City for the reason that Indianapolis Gas should have been realigned with Chase, the plaintiff, and thus diversity of citizenship, the sole ground upon which Federal jurisdiction is based, would thereby be destroyed.

The opinion of this Court, and particularly the conclusions appearing on page 26 thereof, show that there was no collision of interest between Chase and Indianapolis Gas because the judgment ordered entered will be equally beneficial to both Chase and Indianapolis Gas. The City is named as first in liability. The taxing power of the City, according to this Court's opinion, is available to pay the lease rentals; the Citizens Gas plant and the Indianapolis Gas plant properties art available, and the revenues from the operation of the plant are available. With these levied on *first*, it is clear that Indianapolis Gas being *third* in order of liability, is more thoroughly insulated against execution than ever before. In reality the judgment ordered entered will not be *against* Indianapolis Gas but will be a judgment in its favor. Upon the dominant question in this case and the dominant point in the decision of this Court: whether the lease was enforceable against the City, Chase and Indianapolis Gas have identical interests.

Chase and Indianapolis Gas have a unity and identity of interest not only on the main issue involved in this cause, but on every other issue involved.

It is the duty of this Court to determine the fundamental question (the jurisdiction of the subject-matter),

and to order the dismissal of the case at any time whether the question has been suggested by counsel or not.

III.

(Brief, pages 14-16.)

The Court erred in directing that a coercive judgment presumably payable out of the general revenues of the City be entered in favor of Chase, thus requiring, if necessary, municipal revenues raised by taxation to be applied in payment of rentals under the lease. Section 29 of the lease shows the intention of the parties to have been that the corporate assets and franchises were the sole security relied on. As to future rentals, it may well be that the revenues of the City are subjected to this liability even though the property of Indianapolis Gas be destroyed by competition.

IV.

(Brief, pages 16-20.)

Neither the Fishback case (193 Ind. 282), the Williams case (206 Ind. 448), the Todd case (46 F. 2d 855), nor the Cotter case (46 F. 2d 855), is res adjudicata of the issues presented in this case, and this court in relying on such decisions as res adjudicata, and inferentially although not directly, holding that the City was estopped by such judgment, has erred in that it has not followed the rule laid down in *Erie Railroad v. Tompkins*, 304 U. S. 64, wherein it is held that there is no general Federal common law and that except in matters governed by the Federal Constitution or by the Acts of Congress, the law to be applied in any case is the law of the state.

The above enumerated decisions are not res adjudicata of the issues here involved when measured by the firmly

established principles laid down by the Indiana Supreme Court, nor is the City estopped by any of such judgments.

V.

(Brief, pages 20-22.)

The Court apparently relied upon certain acts as showing that the City was estopped to deny the enforceability against it of the lease of September 30, 1913, although there is no express holding to that effect. No such estoppel can be made the basis of any liability against the City. There is no proof that any present holder of Indianapolis Gas bonds knew of any such claimed acts of estoppel or relied upon them in the purchase of their bonds.

An estoppel cannot be made the basis of liability against the City, a municipal subdivision, because such municipal subdivision cannot be estopped by an act of any officer beyond the scope of his authority.

This rule is firmly settled by decisions of the Indiana Supreme Court.

VI.

(Brief, pages 22-29.)

The Court erred in holding that the 99 years lease between Citizens Gas and Indianapolis Gas is enforceable against the City for the additional reasons that the Shively-Spencer Act (Chapter 76, Acts 1913) did not give the Public Service Commission the power to abrogate the contract between the City and Citizens Gas as expressed in the trust instrument.

The charter of a corporation such as Citizens Gas cannot be changed by subsequently enacted laws unless there is reserve power so to do.

The record in this case shows that the City did not accept the lease; but, on the contrary, expressly rejected it.

The trust instruments, as the Court says on page 17 of its opinion, neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. It is well settled that grants of rights and privileges by a state or municipality are strictly construed, and whatever is not unequivocably granted is withheld, and nothing passes by implication. The trust instruments being silent on the trustee's power, such power cannot be implied.

VII.

(Brief, pages 29-30.)

The Court erred in holding that the lease of September 30, 1913, was enforceable against the City for the reasons that the City never executed it nor signed it; was not a party to it; was not named as a party obligated; was not an assignee (an assignment was tendered and rejected); no municipal authority having the power to do so ever authorized the execution of the lease, ratified it, or agreed to be bound by its terms.

VIII.

(Brief, pages 30-33.)

The Court erred in not holding the lease invalid because against public policy of the State of Indiana and because in violation of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly 1905. These sections expressly limit power of City officials and City departments to contract, and Section 254 expressly limits

the power of a City to contract for the furnishing of utilities for a term longer than 25 years.

IX.

(Brief, page 33.)

The Court erred in refusing to abide by the rule of the United States Supreme Court in the case of *Erie Railroad v. Tompkins*. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state whether declared by its Legislature in a statute or by the highest court in a decision. There is no Federal general common law.

In this case the Court has not followed the Indiana rule respecting any of the questions submitted in this case.

CONCLUSION.

(Brief, page 37.)

A rehearing and a reargument of this cause should be granted. The opinion of this Court entered on June 6, 1940, should be reconsidered and the opinion of the District Court affirmed, or in the alternative the case should be remanded to the District Court with instructions to hear and decide the issues of law and fact of burdensomeness.

We submit that if the alternative course is chosen that the cause be remanded to the District Court for a hearing and decision on the issues of law and fact of the burdensome character of the lease.

PROPOSITIONS OF LAW.

I.

Since the District Court with the agreement of all parties reserved the issue of the burdensomeness of the lease for future determination, it is a denial of due process of law to defendants, as guaranteed to them by the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States, for this Court to order a judgment entered declaring the lease of September 30, 1913, to be enforceable against it and directing the entry of a coercive judgment for past instalments of rental.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 81 L. ed. 1093;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. ed. 1107.

Hocaq v. Elliott, 167 U. S. 409, 42 L. ed. 215, 221.

(a) Defendants are entitled to be heard on both the questions of *law and fact* as to whether the order of the Public Service Commission, approving the lease, and the Williams case (206 Ind. 448) are res adjudicata. To deny such a hearing is to deny the process of law.

Requirements of due process are satisfied only by a hearing in the trial court.

Ohio Water Works Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, 914.

II.

The District Court has no jurisdiction of the subject matter. This court's opinion shows that the interests of

Chase and Indianapolis Gas are identical and thus Indianapolis Gas should be realigned with Chase, which would destroy diversity of citizenship, the sole ground upon which jurisdiction is asserted.

Sutton v. English, 246 U. S. 199, 62 L. ed. 644;

Niles-Bement Pond Co. v. Iron Moulders, 254 U. S. 77, 65 L. ed. 145;

City of Dawson, etc. v. Trust Co., 197 U. S. 178, 49 L. ed. 713.

III.

None of the following cases, viz:

Fishback v. Public Service Commission, 193 Ind. 282;

Williams v. Citizens Gas, 206 Ind. 448;

Todd v. Citizens Gas Co., et al., 46 F. 2d 855;

Cotter v. Citizens Gas Co., 46 F. 2d 855;

is res adjudicata of any of the issues presented in this case nor is the City or any of the individual defendants estopped by any of such judgments, under the settled law of Indiana as announced by its highest courts, which this court by reason of the decision in *Erie Railroad v. Tompkins*, 304 U. S. 64, is bound to follow.

Jones v. Vert et al., 121 Ind. 140, 141;
Maple et al. v. Beach, 43 Ind. 51, 59;
Kitts v. Wilson, 140 Ind. 604, 610.

IV.

Neither the City nor any of the individual defendants is estopped to deny the enforceability of the lease of September 30, 1913, because there is no proof that any present holder of Indianapolis Gas bonds knew of or relied upon any of the claimed acts of estoppel; and, furthermore, no municipal subdivision in Indiana can be estopped by an act of any officer beyond the scope of his authority.

Ross et al. v. Banta, 140 Ind. 120, 150;

Union School Township v. First National Bank, 102 Ind. 464, 476;

Hosford v. Johnson et al., 74 Ind. 479, 485;

Platter v. Board of Commissioners, etc., 103 Ind. 360, 381.

V.

The Public Service Commission law of Indiana (Chapter 76, Acts of 1913) did not affect the powers or duties of Citizens Gas as initial trustee because the charter of a corporation such as Citizens Gas cannot be changed by subsequently enacted laws unless there is reserve power to do so.

Trustees of Dartmouth College v. Woodard, 4 Wheat. 518, 4 L. ed. 629.

VI.

The lease executed on September 30, 1913, by Citizens Gas is not enforceable against the City because the City was not a party to it; it did not sign or execute it; it is not named as a party obligated; it is not an assignee of the

lease; no ordinance was ever adopted by the Common Council, nor any resolution by the Board of Public Works of the City, authorizing the execution of the lease, ratifying it or agreeing to be bound by its terms. No action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms. The only action which the City took in connection with this lease was to reject it.

II R. pp. 464, 468.

III R. pp. 982–986.

VII.

The lease of September 30, 1913, is invalid as against public policy because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly 1905.

Chapter 192, Acts 1905.

VIII.

This Court erred in refusing to abide by the rule of the U. S. Supreme Court laid down in the case of *Erie Railroad v. Tompkins* (304 U. S. 64) in determining the questions of estoppel, res adjudicata, the powers of an Indiana corporation, and the powers of a trustee of an Indiana public charitable trust.

There is no general Federal common law, and this Court in this case is bound by the law of Indiana as it has been declared by the Indiana Legislature and by the Supreme Court of the State of Indiana.

Erie Railroad v. Tompkins, 304 U. S. 64, 82 L. ed. 1188.

ARGUMENT.

I.

This Court has directed that a final judgment be entered against the City declaring the lease of September 30, 1913, to be enforceable against it and directing the entry of a coercive judgment for unpaid interest without there having been any hearing on the question of the burdensome character of the lease of September 30, 1913. This the Court has done although it has held that if the lease was in fact improvident or burdensome Citizens Gas as initial trustee had no power to execute it and such lease can be set aside at the instance of the beneficiaries of the trust.

1. The lease of September 30, 1913, between Citizens Gas and Indianapolis Gas has been held by this court to be enforceable *against the City without the City having its day in Court on the question of whether Citizens Gas as initial trustee executed a lease which was burdensome in character and, therefore, beyond its power to agree to. This issue was reserved for further determination by the lower court by agreement of counsel for all parties.* Without an opportunity to be heard on this reserved issue defendants-appellees have been denied due process of law as guaranteed by the Fifth Amendment and the Fourteenth Amendment and each of them to the Constitution of the United States.

2. If all other points, upon all of which we confidently rely, are decided against the City by this Court we assert the undoubted right to be heard on the evidence on the issue of whether the initial trustee agreed to a burdensome lease which may, under the decision of the Court in this case, be held invalid at the instance of the City as successor trustee on behalf of the beneficiaries of the trust.

(a) Certainly, when this Court has ruled that an initial trustee is without power to execute a burdensome lease that issue may not be decided against the City with-

> under the terms of the lease, no facts are alleged to support such a conclusion. And if such a conclusion were justified, the complaint does not make out a case for equitable relief of cancellation and "recapture" of the rentals paid over a period of seventeen years during which the Citizens Gas Company had the use of the physical equipment and the benefit of the income derived from this use. Further it was within the jurisdiction of the public Service Commission to consider and approve the lease and the complaint discloses that the Public Service Commission did approve it. The complaint does not make out a case for any relief on the basis of invalidity of the lease or of the action of the Commission in approving the same."

Furthermore, due process of law entitles defendants-appellees to a hearing and decision by the trial court on the law questions as to whether the order of the Public Service Commission approving the lease, or the decision in the Williams case, decided the question of burdensomeness. It make no difference if defendants after a hearing are found to be wrong, they are nevertheless entitled to a hearing.

In *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 221, it was said:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and

out the right, inherent in our system of law, to be heard on the factual question involved.

3. The proposition for which the City contends in this connection is expressly recognized by this Court in its opinion as modified in these causes. We quote from page 20 of the opinion of this Court the following relevant language:

> "In making a long term lease a Trustee is under duty to act with prudence. If a Trustee makes a lease which is unreasonable under the circumstances he thereby commits a breach of trust. For this a Trustee incurs liability to the beneficiaries who in addition may have such a lease set aside * * *."

(a) It is no answer to this argument to suggest that the Public Service Commission of Indiana approved the lease because, admittedly, it possesses and can exercise no judicial power. This Court recognized the administrative character of the Public Service Commission (opinion pp. 5 and 6). Nor is it an answer to the contention to state that the Supreme Court of Indiana in the case of *Williams v. Citizens Gas Company, et al.*, 206 Ind. 448, did not find that the lease had been improvidently executed or was burdensome because, admittedly, no such issue was before that Court. We quote below the relevant language of the Supreme Court of Indiana in *Williams v. Citizens Gas Co.*, 206 Ind. 448.

In *Williams v. Citizens Gas Co.*, 206 Ind. 448, at 458, it was said:

> "In respect to the alleged invalidity of the lease executed between the Citizens Gas Company and the Indianapolis Gas Company it appears from the complaint that the lease was one which the Citizens Gas Company and Indianapolis Gas Company had the power to execute and one which would result in great advantage to the Citizens Gas Company. If the lease was improvident from the standpoint of the lessee in that the consideration was excessive in view of the value of the use of the assets required

> enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."
>
> • • •
>
> "And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry," and "render judgment only after trial." ' "

The doctrine of res adjudicata is based on the ground that the party to be affected has litigated or had an opportunity to litigate a question before a court of competent jurisdiction.

Due process under the Fifth Amendment and the Fourteenth Amendment and each of them to the United States Constitution requires a hearing be given a party before conclusive effect is given to a prior judgment.

An appeal is a matter of grace; a hearing a matter of right. As was said in *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 64 L. ed. 908, 911, "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment *as to both law and facts; otherwise the order is void because in conflict with the due process clause.* . . ." (Our emphasis.)

This rule is certainly applicable in the case of a municipality, where it has had no opportunity to be head on either *the law or the facts* on the issue of the burdensome character of a lease imposing upon it under this court's decision a liability of $45,000,000 *and where all parties*

have agreed that there should be such a hearing and the trial court has so ordered.

Defendants are entitled to be heard on whether the lease is burdensome. They are entitled to a hearing on whether the order of the Public Service Commission approving the lease is res adjudicata. They are entitled to hearing as to whether the Williams case (206 Ind. 448) adjudicated the issue of burdensomeness.

4. That the question of the burdensomeness of the lease was directly in issue does not admit of debate. The counter-claim of the City (R. p. 186) contains the following averments:

> "Fourth. That said lease of September 30, 1913, was and is onerous and burdensome upon the City of Indianapolis and the property of said Public Charitable Trust and for that reason was a lease which the initial trustee had no power to make beyond the definitely fixed term of its trusteeship; that among its burdensome provisions are the following:
>
> (a) The payment of annual rent in a sum largely exceeding a fair return on the fair value of the property of The Indianapolis Gas Company.
>
> (b) The requirements heretofore referred to that the Lessee should during the entire term of the lease re-finance the bond issue of The Indianapolis Gas Company and if it should sell said bonds below par to pay the difference to said The Indianapolis Gas Company.
>
> (c) The requirement heretofore referred to penalizing the Lessee in the event it reduced the price of gas.
>
> Fifth. That said lease being burdensome and onerous in its character, as hereinbefore averred, was not binding upon the City of Indianapolis as successor Trustee and did not constitute an asset of said trust which it was bound to accept, but on the contrary it had the right under the law of Indiana to reject the same."

On the 18th day of January, 1939, the court entered pursuant to Rule 42(b) of Rules of Civil Procedure the following order without objection from or exception by any party:

> "It is ordered that evidence shall be heard upon the issues as to whether the lease dated September 30, 1913, from the Indianapolis Gas Company to the Citizens Gas Company of Indianapolis is binding upon and enforceable against the City of Indianapolis or any of the property acquired by it from the Citizens Gas Company of Indianapolis on September 9, 1935, or against the Indianapolis Gas Company or against Citizens Gas Company of Indianapolis and whether plaintiff is entitled to judgment for the rental under said lease or for the interest on the First Consolidated Mortgage Five Per Cent Gold Bonds of the Indianapolis Gas Company which has accrued since April 1, 1936, against any of said defendants or said property, with the one exception that evidence shall not be heard therewith but shall be deferred on one certain reason assigned by the City of Indianapolis in its answer, for claimed unenforceability of such lease against it or its said property, viz: that the City as successor trustee of a certain public charitable trust in property of the Citizens Gas Company of Indianapolis had the right as such successor trustee *to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust;* reserving the right to make such order or decree as may seem just and appropriate to the Court at any stage of this proceeding.
>
> The trial of all other issues in this case is deferred until the further order of the Court with the right reserved to refer any or all issues to a Master." (Our emphasis.) R. pp. 321 and 322.

Chase's counsel at the time Chase's case was rested said:

"Of course there are other issues to be reserved for later trial." (R. p. 475.) (Our emphasis.)

It thus appears that one of the issues upon which, admittedly, the City had the right to be heard has been reserved for future determination. This was Chase's understanding at the trial.

The City has no desire or right to deny the validity of this order *which was entered without objection by the City, Chase or any other party.* Chase cannot in good faith deny its validity. If Chase should do so, then Chase's appeal should be dismissed because in such event the case has only been partially determined and there would be no appealable final judgment.

5. The fact that such reservation had been made was pointed out to this Court both in the briefs of Chase and the City.

(a) At page 2 of Chase's brief appears the following:

"By order of the Court entered January 18, 1939 (II R. p. 321), the other issues raised by the bill as amended and supplemented were reserved for trial at a later date."

(b) But this point was more clearly made in the City's brief. We quote from page 124 of our brief in No. 7143 as follows:

"The Court reserved the issue of the burdensomeness of the lease *and there is therefore no evidence before the Court on this question,* but this court can ascertain from the record some of the conditions imposed upon the City by the lease. In the first place the rental is absolutely fixed. The rental consists of 5% interest on the bonds, 6% dividends on the stock and taxes (see page 7 of this brief where the total payments made on these various accounts are set forth). When it is borne in mind that these payments were irrevocably fixed

and cannot be changed in any way, some idea of the character and extent of the claimed obligation of the City can be realized. No matter what the price level and a fair rate base may be, no matter what the condition of the property is, no matter what the economic condition is, and no matter what the prevailing interest rates may happen to be, it follows that if the lease is held to be valid and within the power of the initial trustee to execute, these large and fixed payments must be made. If at the present time, a municipal corporation may borrow money at $2\frac{1}{2}$ or 3 per cent, as this court will judicially notice, the payments go on to the stockholders and bondholders of Indianapolis Gas at approximately twice that rate. Can any one imagine that it was within the contemplation of the settlors of the trust that such a lease was within the granted authority of Citizens Gas to make." (Our emphasis.)

6. The fact that such a reservation was made was mentioned, but not stressed in oral argument at the Bar of this Court but apparently has been overlooked. There is no adjudication and there is no estoppel which prevents the City from having a determination of this issue on the facts.

We respectfully urge that whatever disposition may be made of the other points raised by us on this petition for a rehearing that if the Court should still hold that this cause should be reversed that it should not be reversed with directions to enter a final judgment but with instructions to determine on the fact and the law the issue of the burdensome character of the lease. Nothing short of such a hearing will satisfy the requirements of due process under the Federal Constitution. No party should have its cause determined against it without its day in court.

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 81 L. ed. 1093;

Brinkerhoff-Faris Trust & Savings Co. v. Kell, 281 U. S. 673, 74 L. ed. 1107.

II.

The Court erred in sustaining the jurisdiction of the lower court of the subject-matter of this controversy and directing judgment to be entered against the City because Indianapolis Gas should have been re-aligned with Chase, and thus diversity of citizenship would have been destroyed. Alignment of the parties in any case must be determined by their relation to the main controversy and not by their relation to dependent or subsidiary questions.

1. The Court on its own motion should have reconsidered its opinion in *Chase National Bank of New York v. Citizens Gas Co.*, 96 F. 2d 363, in which it held that the Indianapolis Gas Company was an indispensable party to the controversy, but in which it also sustained the jurisdiction of the lower court on the ground that there were questions involved in the case in which Chase and Indianapolis Gas were not aligned in interest.

2. The real controversy is whether the lease between Citizens Gas and Indianapolis Gas is valid and enforceable against defendant City of Indianapolis.

3. The actual position taker on the record by the parties to this controversy, is:

Defendant Citizens Gas Company says that whether or not the City is subject to this lease it has itself fully performed its duties and is under no further obligation to plaintiff or any other defendant. (R. p. 221, 230).

Defendant City maintains that the lease is invalid and unenforceable against the City. (R. p. 141-208, 209-212, 266-269).

On the other hand, plaintiff asserts that the lease is a binding obligation against the City. (R. p. 3, 20, 21). Defendant Indianapolis Gas also asserts the lease is binding upon the City (R. p. 137, 138; 215, 219).

4. The opinion of this Court holds that Chase was entitled to a coercive judgment for the unpaid and overdue interest represented by the coupons, together with 5% interest thereon from maturity to judgment, and 5% interest on the judgment from entry to satisfaction, which judgment was to be enforceable against the parties in the following order of liability:

First. The City and the trust property.

Second. Citizens Gas.

Third. Indianapolis Gas.

If a coercive judgment is entered against the City it may be mandated to pay that judgment through the medium of a tax levy. *Cox v. State*, 182 Ind. 497.

5. *There is no possibility that Indianapolis Gas will be required to pay this coercive judgment.*

Certainly this is true if the court intended to hold that the coercive judgment should be payable out of the general revenues of the City raised by taxation.

Even if the court should modify its opinion in this respect it is still true that the Indianapolis Gas Company cannot from a practical standpoint ever be required to pay the judgment. This results from the facts thoroughly established in the record:

First. That there has been deposited in escrow under the agreement of March 2, 1936, sums of money equal to the interest on the bonds and the dividends on the stock of Indianapolis Gas which are immediately to be paid over to the interested parties in the event there is a final decree determining that the lease of September 30, 1913, is valid. There, therefore, remains to be paid only the interest on the coupons from the date of their respective maturities at the rate of five per cent per annum and the interest on the judgment from the date of rendition to the date of satisfaction. The record shows the entire ability of the City to pay these sums out of the revenues arising from the operation of the trust property. (R. pp. 542, 543.)

The opinion of the court and particularly the conclusions appearing on page 26 of the opinion show that there was no collision of interest between Chase and Indianapolis Gas. This is true because the judgment which was ordered entered will be equally beneficial to both Chase and Indianapolis Gas in in reality will amount to a judgment not *against* Indianapolis Gas but a judgment in its favor.

The dominant question upon the answer to which depended the final decision in this cause and the dominant point in the decision of this court was whether the lease was enforceable against the City, and in that judgment which has been ordered entered Chase and Indianapolis Gas will have identical interests.

It has been held that Indianapolis Gas is an indispensable party to this controversy, and it is.

> *Chase National Bank v. Citizens Gas Co.*, 96 F. 2d 363, 366.

Where federal jurisdiction is wholly dependent on diversity of citizenship it is the duty of the court to align

the parties in accordance with their interests regardless of whether they are named as plaintiffs or defendants.

> *Sutton v. English*, 246 U. S. 199, 62 L. ed. 664;
> *Niles Bement Pond Co. v. Iron Moulders*, 254 U. S. 77, 65 L. ed. 145.
>
> *City of Dawson, etc., Trust Co.*, 197 U. S. 178, 49 L. ed. 713.

Looking at the judgment which this court ordered entered, we see that the City is named as *first* in liability. The taxing power of the City is available to pay the lease rentals; the Citizens Gas plant and the Indianapolis Gas plant properties are available, and the revenues from the operation of the plant are available. With these to be levied on *first* it is crystal clear that Indianapolis Gas being *third* in order of liability is more thoroughly insulated against execution than ever before. This opinion shows that Chase and Indianapolis Gas have interests which are identical.

If Indianapolis Gas be realigned according to its real interest in the dispute involved in this controversy, viz: the enforceability of the 99-year lease against the City it is inevitably realigned with Chase. This is true because the City has now been held to be bound by the lease and required to pay the obligations of Indianapolis Gas. No matter what the form of the judgment may be no one can realistically suppose that Indianapolis Gas has been harmed by the entry of this judgment or that it will be required to pay a single penny as a result of it. On the contrary, it will have obtained as a result of the decision of this Court exactly what it sought from the commencement of this litigation: A decree requiring the City to make the payment and as a practical proposition exempting it from all responsibility to Chase.

Chase and Indianapolis Gas have a unity and identity of interest not only on the main issue involved in this cause but on every other issue involved. It was to the interest of both to obtain a decree declaring that the lease was valid and enforceable against the City. It was to the interest of both to obtain a coercive judgment against the City requiring that the City pay either out of its general revenues raised by taxation, from the fund escrowed under the agreement of March 2, 1936, or from the revenues arising from the operation of the trust property, the interest on the bonds and the dividends on the stock of Indianapolis Gas. When this was done Indianapolis Gas was insulated from liability. The result is that Chase and Indianapolis Gas together have maintained an action in the Federal Court where this Court has recognized that Indianapolis Gas is an indispensable party and where the interest of Chase and Indianapolis Gas is a joint interest.

This they have done when in the language of the Supreme Court of the United States in the *City of Dawson v. Columbia Trust Co.*, 197 U. S. 178, 49 L. ed. 713,

> "The arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist."

It is the duty of this court to determine the fundamental question of jurisdiction of the subject-matter and to order the dismissal of the bill at any time. In this respect it makes no difference whether the question has been suggested by counsel or not.

> *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140;
>
> *Continental National v. Buford*, 191 U. S. 119, 48 L. ed. 119.

III.

The Court erred in directing that a coercive judgment, presumably payable out of the general revenues of the City, be entered in favor of Chase, thus requiring, if necessary, municipal revenues raised by taxation to be applied in payment of rentals under this lease.

There was no limitation in the Court's opinion that the unpaid coupons and interest on them to the date of judgment and interest on the judgment from the date of entry to satisfaction, should be collectible only out of revenues arising from the operation of the Gas property.

The lease itself shows that it was clearly the intention of the parties that the rental payments were to be made from revenue. Section 29 of the lease provides in part that:

> "The lessor and lessee mutually convenant that they will each look for the carrying out of the obligations of this lease solely to the corporate assets and franchises of the other . . ." (R. p. 78).

Under the facts shown by the record in this case it is clear that the City will be able to pay the amount of the coercive judgment directed to be entered against it for the past due interest together with interest thereon and interest on the judgment without a resort to a tax levy. We make no claim that in respect to the past due instalments of rent there is any danger to the City because of the failure of the Court to impose any limitation upon the City's liability for rental. *But the case in respect of future rentals is far different.* There are now outstanding $6,881,000 of bonds on which the annual interest is $344,050 and $2,000,000 of stock on which the annual dividends are $120,000. The City's liability under this lease thus

amounts to $464,079 annually without giving and consideration to income taxes, property taxes or organization expenses of Indianapolis Gas. These additional expenses amounted for the last 4 years to an average of $245,000 annually. (R. pp. 1020-1031.)

With the heavy overhead burden imposed upon the City as a result of the declaration of the validity of this lease it is entirely possible and indeed probable that future operation of this Company may be at a loss or alternatively that competition from many sources may be encountered by the City. We do not believe that this court intended by its decision that there should be guaranteed to the bondholders and stockholders of Indianapolis Gas for a period of more than 75 years in the future these tremendous sums of money irrespective of whether the plant might be successfully operated by the City and even though it may be destroyed by competition.

IV.

This Court apparently relied on the decisions in the following cases as res adjudicata of some or all of the issues presented in this case and inferentially, although not directly, held that the City was estopped by such judgments.

1. *Fishback v. Public Service Commission*, 193 Ind. 282;
2. *Williams v. Citizens Gas*, 206 Ind. 448;
3. *Todd v. Citizens Gas Co. et al*, 46 F. 2d 855;
4. *Cotter v. Citizens Gas Co.*, 46 F. 2d 855.

The settled rule of law in Indiana in order for a judgment to operate as res adjudicata has been well expressed in *Jones v. Vert, et al*, 121 Ind. 140, 141, where it is said:

> "Ordinarily, four things must concur before the principles of res adjudicata can be invoked: 1. A suit. 2. A final judgment. 3. Identity of subject-matter. 4. Identity of parties."

A long line of decisions by the Supreme and Appellate Court of Indiana from which counsel have found no departure hold, first, that a judgment in a former suit is binding as res adjudicata in a subsequent action *only between the same parties;* second, that a former judgment is not res adjudicata in a subsequent action even between the same parties except when *the issues in the two cases are the same, unless* the exact point involved in the second case was actually litigated in the first suit and the facts have not changed; and third, that any judgment in a prior action cannot be successfully pleaded as a bar unless it is *mutually binding on the parties.*

See *Maple, et al. v. Beach*, 43 Ind. 51, 59;
Kitts v. Wilson, 140 Ind. 604, 610.

This Court under the decision in *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, is bound by the law of Indiana as announced by its highest courts.

1. The Fishback case is not res adjudicata of the issues presented here because:

> (a) Neither the City, any trustee under Indianapolis Gas mortgage nor any bondholder of Indianapolis Gas was a party to the final judgment. There is, therefore, a total lack of mutuality of estoppel.
>
> (b) The issues in the Fishback case were wholly different from the issues in this case and the question of the validity and enforceability of the lease

against the City was not and could not have been decided in that case.

(c) The capacity in which the parties sued and were sued negatives any claim of estoppel by judgment. No claim was asserted in the Fishback case that any public charitable trust existed.

(d) The transfer of the trust res to the City on September 9, 1935, has so altered the rights of the parties as to prevent the judgment in that case being an adjudication in this.

2. The Williams case is not res adjudicata because:

(a) The issues in the Williams case were essentially different from the issues in these cases. In the Williams case plaintiff attempted to procure a determination of the invalidity of the lease on the ground that the execution of the lease violated rights guaranteed to Williams by both State and Federal Constitutions and that said lease had been executed as the result of a fraudulent conspiracy. The enforceability of the lease against the City and the right of the initial trustee to bind the City to the terms of the lease were not actually litigated and could not have been litigated under the issues in the Williams case.

(b) The transfer to the City of the trust res on September 9, 1935, creates a situation which so alters the rights of the parties as to prevent a successful assertion of res adjudicata. When the Williams case was finally decided, the City had not taken over the trust res and until that was done the questions here involved were not in issue. No attempt was made to obtain a declaratory judgment against the City in respect of any *obligation* supposed to be imposed on it under the terms of the lease.

(c) Although Indianapolis Gas and its mortgage trustees and the City were co-defendants, and al-

though the City formally asserted in a pleading filed that the validity of the public charitable trust was in no wise affected by the question of whether the lease was valid or invalid, Indianapolis Gas and its mortgage trustees tendered no issue to their co-defendant, the City, in respect of the enforceability of the lease against it. *Under settled rules of law, the judgment cannot adjudicate the issues here presented as between such co-defendants.*

(See *Whitesell v. Strickler*, 167 Ind. 602.)

3. The Todd judgment is not res adjudicata because:

(a) Neither Indianapolis Gas, its mortgage trustee nor any of its bondholders were parties in any capacity. There is a total lack of mutuality of estoppel. Had the enforceability of the lease against the City been in issue and had the Court decided that the lease was unenforceable, none of these plaintiffs would have been bound by the judgment. How then can they successfully claim the benefit of it?

(b) The cause of action in the Todd case, and the cause of action in these cases are essentially different and the question of the enforceability of the lease against the City was not litigated, and could not have been litigated, under the issues presented in the Todd case.

(c) The estoppel of a judgment extends only to the facts in question as they existed at the time the judgment was rendered and does not prevent an examination of the same questions even between the same parties, where at a later time the facts have changed or new facts have occurred which may alter the legal rights or relations of the parties. At the time of the entry of the decree in the Todd case there was no existing controversy in respect of the enforceability of the lease between Indianapo-

lis Gas and its bondholders on the one side and the City on the other. The Todd case was finally disposed of on May 29, 1930. The facts and circumstances have altered and changed since the date of the decree in the Todd case by reason of the transfer of the trust property on September 9, 1935, to the City as successor trustee and because of the fact that shortly before the time of such transfer and in July, 1935, the first indication of a controversy arose as to the binding effect of the lease on the City.

The Cotter case was not pleaded as res adjudicata. Apparently, some weight is given to the admission made by former counsel for the City in the answer in that case that the lease in question was valid.

In the first place, the validity of the lease was not in issue but in the second place the answer was signed only by counsel, was unverified and there was no attempt to show that the information contained in the answer could have been furnished solely by the City.

Under such circumstances it is settled law that the answer could not bind the City.

Habirshaw etc. Cable Co. v. Cable Company, 296 Fed. 875.

V.

This Court apparently relied upon certain acts as showing that the City of Indianapolis was estopped to deny the enforceability against it of the lease of September 30, 1913, although there is no express holding to that effect. There are outstanding reasons why such an estoppel cannot be made the basis of any liability against the City. The first

of these is that it has been admitted throughout the entire conduct of this case that no attempt whatever has been made to prove and no proof has been made that any present holder of Indianapolis Gas bonds knew of any such claimed acts of estoppel or relied upon them in the purchase of their bonds. Under the controlling decisions in the following cases decided by the Supreme Court of Indiana this is one of the precedent conditions to the assertion of estoppel.

Hosford v. Johnson, et al., 74 Ind. 479, 485;

Ross et al., v. Banta, 140 Ind. 120, 150.

In *Ross, et al., v. Banta*, 140 Ind. 120, 150, the Supreme Court of Indiana thus announced the applicable rule which is absolutely decisive of the question of estoppel relied upon by our opponents:

> "Persons who set up acts of another as an estoppel must show that they acted upon the same, and were influenced thereby to do some act which would work injury, if such other party is allowed to deny the truth of what he did."

So far as the evidence in this case shows the last purchase made of Indianapolis Gas bonds for any bondholder represented by Chase was made in August, 1931, except certain bonds purchased by the Citizens Gas in 1932. We have repeatedly argued that no act or representation done or made by the City at any time subsequent to these dates could be relied upon as an estoppel. This argument has never been answered.

The second and controlling reason why estoppel cannot be made the basis of liability against the City is that

no municipal subdivision can be estopped by an act of any officer beyond the scope of his authority.

Union School Township v. First National Bank, 102 Ind. 464, 476;

Platter v. Board of Commissioners, etc., 103 Ind. 360, 381;

Citizens Bank, etc., v. Town of Burnettsville, 98 Ind. App. 92, 191.

These decisions, the controlling effect of which has never been challenged by any citation of authority by our opponents have been wholly disregarded by this Court and thus this court if it places any reliance upon the question of estoppel has disregarded the decision of the Supreme Court of the United States in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

Under the decision last cited it is held there is no general federal common law. This court is bound to follow the decisions of the Supreme Court of Indiana in determining the question of estoppel and we respectfully request that this court now hold that the City cannot be bound to the terms of the lease of September 30, 1913 on the doctrine of estoppel.

We have pointed out in our original brief that no representations as to the validity of this lease were ever made by any authorized officer of the City. This question of fact we do not desire to discuss further because no matter how it may be decided the City cannot be bound in this case by an estoppel.

VI.

This Court erred in holding that the 99 years lease between Citizens Gas and Indianapolis Gas is enforceable against the City for these additional reasons:

1. The Court in its opinion said:

> "The power to execute this 99 years lease was authorized by the Commission in 1913."

The Court refers to the Public Service Commission of Indiana which was created by the Shively-Spencer Act. Thus, the Court apparently holds that the Shively-Spencer Act gave the Public Service Commission the power to abrogate the contract between the City and Citizens Gas as expressed in the trust instruments including the corporate charter of Citizens Gas.

Citizens Gas charter was neither legally abrogated nor legally altered by the enactment of the Shively-Spencer Act. As was said by this Court in the case of *Todd v. Citizens Gas*, 46 F. 2d, 855, 868:

> "We find nothing in the language of the statute (Chapter 76, Acts 1913) or in the decisions of Wisconsin prior to its enactment which would indicate an intention on the part of the Legislature that a public utility, by surrendering its franchise, might *thereby destroy vested property rights which it had voluntarily created, and release itself from obligations respecting those rights which it had voluntarily undertaken before the existence of the franchise and as an inducement to the municipality to make the grant of the privilege.*" (Our emphasis.)

That the charter of a corporation such as Citizens Gas, cannot be changed by subsequently enacted laws unless there is reserved power, is settled by the case of *Trustees*

of Dartmouth College v. Woodward, 4 Wheat, 518, 4 L. ed. 629 (1819).

Furthermore, the Public Service Commission had no power to determine the validity of the lease, and therefore could bind no one on that proposition. The Public Service Commission being an instrument of the executive department of the State is neither legislative nor judicial in character, and any order made by the Public Service Commission are wholly administrative.

In *Northwestern Telephone Co.*, 201 Ind. 667, 680, 685, the Indiana Supreme Court pointed out that the Indiana Legislature by the enactment of the Shively-Spencer law, vested the Public Service Commission with authority subject to review by the courts, to supervise or regulate the terms of sale "*in so far only as they affect the public*" (Our emphasis).

See: *Public Service Commission, et al. v. City of La-Porte*, 207 Ind. 462, 465;

New York etc. Railroad Co. v. Singleton, et al., 207 Ind. 449, 458.

2. By holding that the City accepted the lease. (Opinion p. 12).

The record shows the exact contrary. At page 330 the record shows that Mr. Thompson representing the City stipulated that:

> "For the City of Indianapolis we will agree the instruments to which Mr. Burns has just referred (among them the lease) were *presented* to the Recorder of Marion County, Indiana, for recordation at 3:45 P. M. on the 9th day of September, 1935 . . .
> And that they were thereafter properly recorded."

Mr. William G. Sparks, one of the attorneys representing Citizens Gas Company, testified (R. p. 464, 467, 468) that he was advised on August 27, 1935, of the attitude of the City respecting the lease.

The record also shows that the assignments of the properties of Citizens Gas were made by four *separate* instruments. Respecting one of these instruments, viz: the assignment of the 99 years lease, Mr. William Sparks testified that Mr. Rastenburg (an officer of Citizens Gas Co.) handed it to either Mr. Rabb (of Thompson & Rabb, attorneys for the City) or to Mr. Dithmer (President of the Board of Directors). "They were all four handed either to Mr. Rabb or to Mr. Dithmer, or somebody there representing the City." On re-direct examination Mr. Sparks (R. p. 468) testified that at this same meeting there was delivered to him a rejection of the 99 year lease which had been signed by Mr. Dithmer as President of the Board of Directors for Utilities, along with a certified copy of a resolution of rejection and a resolution for the temporary use and occupancy of the property. He further testified as follows:

> "Q. You knew, when you went to the office of Thompson, Rabb & Stevenson, that the City was going to deliver the rejection to you when you turned over physically this assignment of the lease?
>
> A. That is right."

3. This Court held that the terms of the trust remained silent on the trustees' powers and that the only applicable language relates to duties.

On page 13 of the opinion the Court states quite to the contrary, as follows:

> "The terms of the trust (the franchise contract and the Articles of Incorporation) refer generally to the duties and *powers* of the trustee and the rights of the beneficiaries." (Our emphasis.)

The trust instruments were the franchise contract from the City to Citizens Gas and the Articles of Incorporation of Citizens Gas. The franchise provided a method for the obtaining of the objects of the corporation to be formed, and safeguarded the interests of the stockholders of such corporation by providing for the return of their money, together with interest. The duty of conveying to the City all the property of the trust was imposed upon the directors of Citizens Gas Company after the obligations to its stockholders had been discharged. The franchise also provided quite significantly that Citizens Gas Company could create no obligation for the purpose of reimbursing its stockholders which would extend for a longer period than *ten years* beyond the term of the franchise. The term of the franchise was twenty-five years.

The trust instruments contained detailed instructions respecting the retirement of the stock; the order in which the earnings should be used; the payment of the bonds; the time within which the City was to exercise its right to take over. Great space was given to these details, yet there is not one word granting power for the execution of a 99-year lease. As this Court said at page 17:

> "The terms of the trust neither expressly conferred upon nor expressly denied the trustee the power to acquire a non-freehold interest in property. In truth the terms of the trust remained silent on the subject of trustees' powers."

Since the trust instruments were the franchise contract from the City of Indianapolis which was a grant of right for the use of the streets and alleys for the laying of gas mains, and the corporate charter of Citizens Gas carrying out the directions of the franchise contract respecting rights, powers and duties, the rule announced in *Piedmont Power & Light Co. v. Town of Graham, et al.*, 253 U. S. 193, 64 L. ed. 855, is controlling. There it was said that:

> "Grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivocably granted—is withheld,—nothing passes by implication."

Thus if the terms of the trust (the franchise corporation and Articles of Incorporation) remain silent on the trustees' powers, the power to make the lease cannot be imp .

4. That the trustee had the power to purchase in fee simple the Indianapolis Gas property and that the attack of the City was as to the mode of acquisition. (Opinion p. 18.)

The initial basis upon which the Court founds this statement is that the City's counsel did not argue that the trustee lacked the power to lease the property of its rival because such action might contravene public policy. This statement entirely overlooks the City's position. The City in Cause No. 7143, at pp. 111, 112, and 113 of its brief made the point that the lease in question was executed in violation of the Indiana statutes, viz: Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly, 1905. The second basis upon which the Court founds this statement is that:

> "Yet we know that the trustee had the power to acquire adequate gas plant equipment. And it is ad-

> mitted that the freehold estate in the property purchased in 1907 (the Consumers Gas Trust Co. mains) became part of the trust res. The trustee had the power to purchase in fee simple and consequently the freehold estate became trust property. From what has just been said certain conclusions follow as a matter of logic: (1) The trustee had the power to purchase the Indianapolis Gas property in 1907 or in 1913; and (2) the trustee had the power to lease this property in 1907 and 1913 for a term of years not exceeding the initial trusteeship." (Opinion p. 18.)

What the Court has definitely overlooked in connection with the lease by Citizens Gas of the property of Indianapolis Gas is the historical background of this public charitable trust. Citizens Gas as Trustee of the Trust was organized to foster and maintain competition against Indianapolis Gas. The citizens of Indianapolis who contributed to that enterprise were interested not in a combination and consolidation of the two properties, but in competition between them.

We call attention to subdivision 7 of the Articles of Incorporation of Citizens Gas (R. p. 97) which reads as follows:

> "Any member of the Board of Trustees may be removed by the Marion Circuit Court upon the showing that said Trustee is an employe or holder of any of the securities or common stock of any other company organized for the purpose of manufacturing or delivering gas to consumers residing in, or in the vicinity of the City of Indianapolis, or for any corrupt practice or any misconduct which said court may deem detrimental to the interests of said Company. * * * *"

If the settlors of the public charitable trust, the res of which was the property belonging to the Consumers Gas Trust Company regarded employment of the trustee by Indianapolis Gas or ownership of its securities as sufficient reason for the removal of the Trustee it is difficult for us to understand why they should have contemplated an implied power to merge the two properties by means of a lease.

The Acts of 1905 gave to the Common Council the power to license and regulate the supply, distribution, and consumption of artificial gas and to designate streets and alleys through which pipes might be laid (p. 252).

Power was also given to the Board of Public Works of the City to purchase gas works "provided, that none of the powers conferred by this paragraph shall be exercised except pursuant to an ordinance specifically directing the same, and after an election had in relation thereto * * *"

Also power was given such Board to authorize gas companies to use the streets and alleys and to prescribe the terms and conditions of such use. (Pp. 279, 280.)

Power was given the City to enter into a contract for the furnishing of heat and light provided such contract was for a term not longer than twenty-five years (p. 396).

Citizens Gas under such circumstances had no right to acquire a competing utility without the consent of proper municipal authority. The undisputed evidence in this case shows that no action was ever taken by the Board of Public Works or the Common Council of the City authorizing the lease of this property.

(Compare Acts 1905, p. 219 as amended by subsequent statutes, Sec. 48-7201 Burns' Ind Statutes 1933.)

It is one thing for an existing utility to extend or enlarge its own plant by construction and it is an entirely different proposition for it to purchase or acquire the plant of a competing company.

VII.

The Court erred in holding that the lease of September 30, 1913, executed by Citizens Gas and Indianapolis Gas was enforceable against the City because:

1. When that lease was originally executed the City was not a party to it; it did not sign or execute it; it is not named as a party obligated; it is not an assignee of the lease, an assignment having been tendered and rejected; no ordinance was ever adopted by the Common Council nor any resolution ever adopted by the Board of Public Works of the City authorizing the execution of the lease, ratifying it or agreeing to be bound by its terms; no action was ever taken by the Board of Trustees or the Board of Directors of the Department of Utilities accepting the lease or agreeing to be bound by its terms.

It has never been contended by Chase that the lease was originally binding on the City. Indeed it could not be known until the property was taken over, which was not until September 9, 1935, whether under any theory of the case the City would be bound by the terms of the lease.

The whole theory of Chase's presentation of this case in its complaint, the amendments thereto, its evidence and its briefs heretofore filed in this Court is that the City became

bound to the terms of the lease by estoppel, res adjudicata, and the operation of the property. As has already been pointed out there could have been no estoppel. The decisions relied on by Chase could not have operated as res adjudicata, and the operation of the property was pursuant to an agreement between Indianapolis Gas and the City which expressly reserved the rights of all parties.

VIII.

This Court erred in not holding the lease invalid because violative of Sections 85 and 254 of Chapter 129 of the Acts of the Indiana General Assembly 1905. Section 85 pro. les:

> "No executive department, officer or employee thereof shall have power to bind such city to any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purposes of such department; and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations are declared to be absolutely void: Provided, That the board of public works shall have power to contract with any individual or corporation for lighting the streets, alleys and other public places or for suppiy ing the City with gas, water, steam, power, heat or electricity, and for the collection, removal and disposal of garbage, ashes or refuse on such terms and for such times, not exceeding the term fixed by section 254 (Sec. 48-7302) of this act, as may be agreed upon; but any such contract shall be submitted to the common council of such city and approved by ordinance before the same shall take effect, and, if so approved, shall immediately become effective: Provided, further, That nothing herein contained shall prevent any such department from issuing any

bond or other obligation expressly authorized by this act and provided for by ordinance."

Section 254 provides:

"Any city or town may enter into contract with any person, corporation or association to furnish such city or town and its inhabitants with water, motive power, heat or light, or drainage or sewerage facilities, or to build or extend railroads, interurban or street-car lines, telegraph or telephone lines, drainage or sewerage system, or other public conveniences, into or through such city or town; and may provide in such contract the terms and conditions on which such water, motive power, heat, light, drainage, sewerage, railroad, interurban, street-car, telegraph or telephone service, or other uses and accommodations of such and other public conveniences may be furnished by such person, corporation or association to such city or town, and to its inhabitants; Provided, That no such contract shall be entered into by any such city or town for furnishing such city or town and its inhabitants with water, motive power, drainage, sewerage, heat or light, upon or along the streets of such city or town for a term longer than twenty-five (25) years: And, provided further, That before any such contract shall be made by any city of the first, second, third, or fourth class such contract shall be first agreed to by the board of public works of such city, after which agreement, such board shall cause a proper ordinance approving and confirming such contract to be presented for adoption by the common council of such city."

The 99-year lease was clearly within the terms of the above quoted statutes because such lease was a contract for supplying the City and its inhabitants with gas, heat and light for a period of years. The lease was not author-

ized or approved by the Board of Public Works or by an ordinance of the Common Council. (III R. 982, 983.) It was never approved by the Department of Utilities nor ratified by it. (III R. p. 984, 985.)

The decision of this court that the lease is enforceable against the City and that a coercive judgment should be rendered against the City for the unpaid interest with interest thereon is susceptible of construction that the rentals reserved in the lease may be collected from the City out of revenues raised by taxation. This question is of no practical importance so far as the past due rentals are concerned.[1] But this is not true as to future rentals.

The parties themselves did not intend that the reserved rentals should be collected through taxation. The lease provided in part the parties would each look "for the carrying out of the obligations of this lease solely to the corporate assets and franchises of the other . . ." (R. p. 78.)

If the rentals can be collected from the City out of revenues raised by taxation for approximately seventy-five years in the future, then even if the property should be destroyed by competition such rental payments would continue. Surely such a result was not contemplated.

---

[1] This is true because the amount of the unpaid interest on the bonds and dividends on the stock has been deposited with the Indiana National Bank as escrow agent under the agreement of March 2, 1936. In addition the record in this case shows that the revenues derived from the operation of the total property are more than sufficient to pay the interest on the unpaid coupons. (R. pp. 542, 543.)

IX.

This Court erred in refusing to abide by the rule of the United States Supreme Court laid down in the case of *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188.

In the Erie Railroad case it was said:

> "Except in matters governed by the Federal Constitution or by acts of Congress the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

The questions involved in this case deal with the powers of trustees of a public charitable trust which was formed in accordance with Indiana law. Also involved was the interpretation of a franchise from a city, the articles of incorporation of an Indiana corporation, as well as other instruments. The complaint seeks to impose the burdens of a 99 years lease upon the City on a theory of estoppel and res adjudicata, all of which must of necessity under the Erie Railroad case involve Indiana law. Thus the rule announced in that case is applicable here.

IN CONCLUSION.

The lease in question was executed in 1913 and approved by the Public Service Commission. That Body is purely an administrative one and can exercise no judicial authority. The lease, in our opinion, is burdensome and disadvantageous to the city and will impose upon future generations of gas users in Indianapolis a liability for payment of rentals wholly disproportionate to a fair return on the fair value of the property. This the City has alleged in its counter claim and stands ready to prove.

There are, in our opinion, two courses available in connection with the issue of the burdensome character of the lease:

1. The first would be to remand this case to the District Court with instructions to hear and decide the issue of burdensomeness *on both the facts and the law*.

2. The second would be to dismiss this appeal on the ground that there is no final appealable judgment.

We stand on the agreement which we made consenting to an order of the District Court reserving the issue of burdensomeness and submit that the first course is the proper one to be pursued.

We respectfully submit that this petition for a rehearing should be sustained and that, for the reasons pointed out, the judgment of the lower court should be affirmed.

Respectfully submitted,

EDWARD H. KNIGHT,
MICHAEL B. REDDINGTON,
WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Attorneys for said Defendants-Appellees.

And on the same day, to-wit: On the fifteenth day of August, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, August 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge,
Hon. Otto Kerner, Circuit Judge.
Hon. Michael L. Igoe, District Judge.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellant,*
7143 *vs.*
Citizens Gas Company of Indianapolis, *et al.*, *Defendants-appellees.*

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-appellee,*
7144 *vs.*
The Indianapolis Gas Company, *Defendant-appellant.*

Appeals from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the motion of counsel for City of Indianapolis, *et al.*, for leave to file a second petition for a rehearing in this Court in these appeals be, and the same is hereby, granted.

It is further ordered by the Court that the said second petition for a rehearing be, and the same is hereby, denied.

And afterwards, to-wit: On the twentieth day of August, 1940, there was filed in the office of the Clerk of this Court, a praecipe for printing additional parts of the record, which said praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellant,* *vs.* Citizens Gas Company of Indianapolis, *et al.,* *Defendants-Appellees.* } Nos. 7143

The Chase National Bank of the City of New York, Trustee, etc., *Plaintiff-Appellee,* *vs.* The Indianapolis Gas Company, *Defendant-Appellant.* } and 7144.

PRAECIPE FOR PRINTING ADDITIONAL PARTS OF THE RECORD.

In addition to the matters stipulated to be printed in the record in the above causes by a stipulation of all parties heretofore filed on July 25, 1940, the Clerk will please print in the transcript of record to be used in the United States Supreme Court, in the above entitled causes, the following:

1. All orders and ruling of the Court in the above causes made subsequent to July 19, 1940.

2. Motion of City of Indianapolis and individual members of the Boards of Trustees and Directors in the above causes, for permission to file a petition for a rehearing addressed to the opinion of the Court as modified on July 19, 1940.

3. The petition of City of Indianapolis and individual members of Boards of Trustees and Directors for rehearing in the above causes, addressed to the opinion of the Court as modified on July 19, 1940.

4. The brief of City of Indianapolis and individual members of Boards of Trustees and Directors on the pe-

tition for rehearing, in the above causes, addressed to the opinion of the Court as modified on July 19, 1940.

5. This praecipe.

W. H. Thompson,
Perry E. O'Neal,
Patrick J. Smith,
Attorneys for Defendants-Appellees.

State of Indiana
County of Marion } ss:

Patrick J. Smith, first being duly sworn, upon his oath deposes and says that copies of the above and foregoing praecipe were mailed by first-class mail on August 19, 1940, to counsel for each and all of the parties in the above causes, viz.:

Howard F. Burns, counsel for Chase National Bank,

Will Sparks, counsel for Citizens Gas Company,

William R. Higgings, Judge Louis B. Ewbank, Counsel for Indianapolis Gas Company,

Harvey J. Elam, William L. Taylor, associates of Howard F. Burns, as counsel for Chase National Bank.

Patrick J. Smith.

Subscribed and sworn to before me, this 19th day of August, 1940.

Mary G. Robinius,
(Seal) *Notary Public.*

My Commission expires October 30, 1943.

Endorsed: Filed August 20, 1940. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1241 to 1407, inclusive, contain a true copy of proceedings had and papers filed made in accordance with the stipulation as to printing of record filed on the twenty-fifth day of July, 1940, and the praecipe for printing additional parts of the record filed on the twentieth day of August, 1940, in the following entitled appeals:

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellant,

7143 *vs.*

Citizens Gas Company of Indianapolis, *et al.*,
Defendants-appellees.

The Chase National Bank of the City of New York, Trustee, etc.,
Plaintiff-appellee,

7144 *vs.*

The Indianapolis Gas Company,
Defendant-appellant.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28 day of August, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 421

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 422

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 423

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 424

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

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